SUPREME COURT, U. S.

APR 4 1970

JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,
PETITIONER,

—v.—

MARTIN MARIETTA CORPORATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1970
CERTIORARI GRANTED MARCH 2, 1970

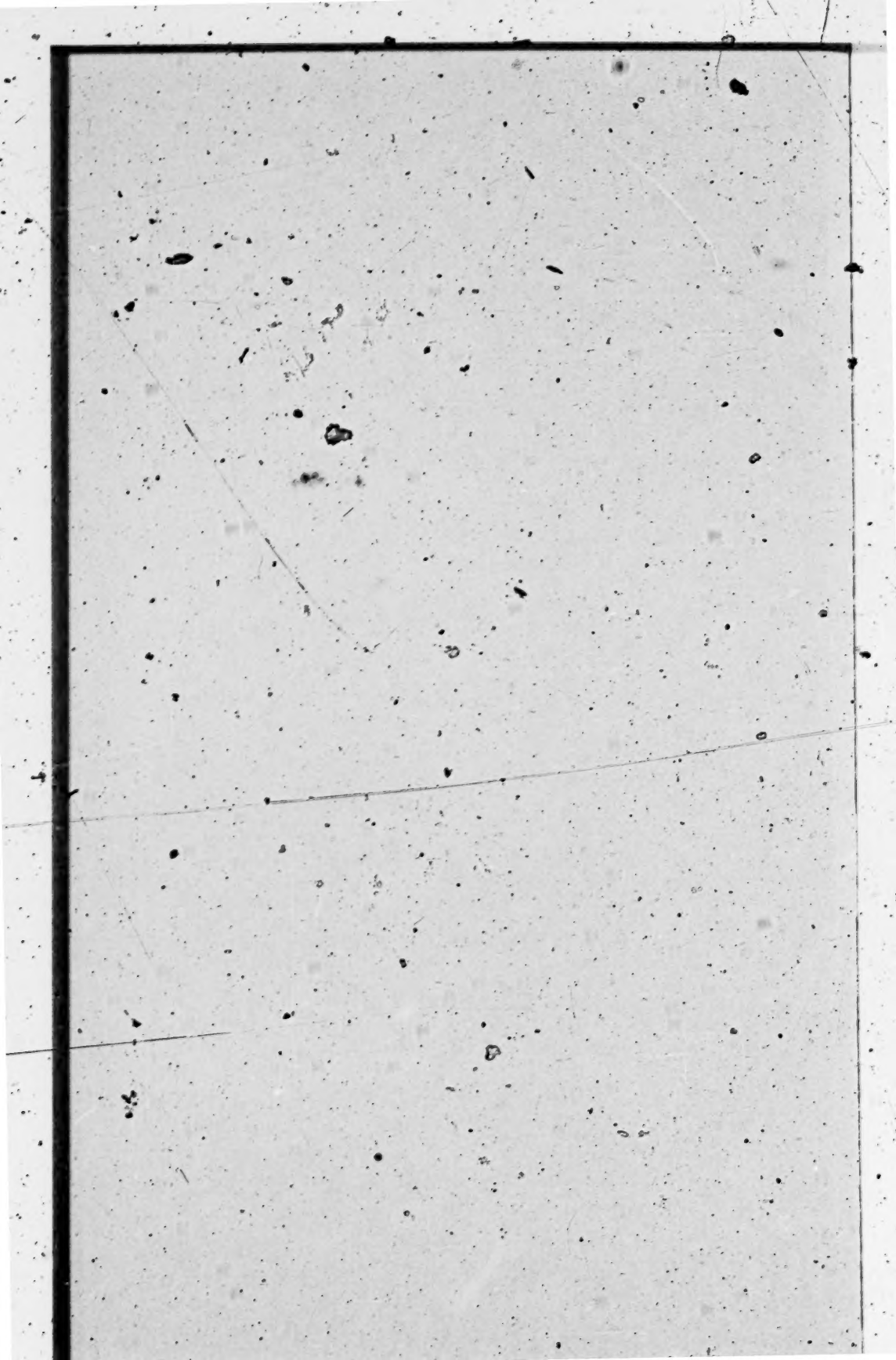

TABLE OF CONTENTS

PAGE

Relevant Docket Entries 1a

Complaint 2a

Exhibit "A", Annexed to Complaint—Letter Dated July 28, 1967 ..... 7a

Exhibit "B", Annexed to Complaint—Decision of Commission 8a

Exhibit "C", Annexed to Complaint—Notice of Right to Sue 11a

Motions to Dismiss and Strike 13a

Order on Motions to Dismiss and Strike 14a

Answer 16a

Motion for Summary Judgment 18a

Affidavit of Donald C. Parsons 19a

Plaintiff's Request for Admission 21a

Order Granting Motion for Summary Judgment 22a

Judgment Dismissing Action 24a

Motion for Leave to Proceed in Forma Pauperis 25a

Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis 26a

Order on Motion for Leave to Proceed in Forma Pauperis 28a

PAGE

Notice of Appeal 29a

Opinion by Court of Appeals for the Fifth Circuit, May 26, 1969 ..... 30a

Judgment of United States Court of Appeals for the Fifth Circuit, May 26, 1969 ..... 39a

Letter Recalling Mandate of United States Court of Appeals for the Fifth Circuit, July 29, 1969 ..... 40a

Order by Court of Appeals for the Fifth Circuit Denying Petition for Rehearing, October 13, 1969 .... 42a

Clerk's Certificate 53a

Order Allowing Certiorari, March 2, 1970 ..... 55a

Relevant Docket Entries

Complaint filed 12 December, 1967

Motions to Dismiss and Strike filed 10 January, 1968

Order denying Motion to Dismiss and granting Motion to Strike filed 27 February, 1968

Answer filed 8 March, 1968

Defendant's Motion for Summary Judgment filed 31 May, 1968

Plaintiff's Request for Admission of Fact filed 26 June, 1968

Order granting Motion for Summary Judgment filed 9 July, 1968

Judgment dismissing action filed 9 July, 1968

Notice of Appeal filed 12 August, 1968

Opinion by Court of Appeals for the Fifth Circuit filed 26 May, 1969

Order by Court of Appeals for the Fifth Circuit denying Petition for Rehearing filed 13 October, 1969

Complaint

(Filed Dec. 12, 1967)

I

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1343(4) and 42 U. S. C. Section 2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U. S. C. Sections 2000e et seq. Jurisdiction of this Court is invoked to secure the protection of and redress the deprivation of rights secured by 42 U. S. C. Sections 2000e et seq., providing for injunctive and other relief against discrimination on the ground of sex in employment.

II

Plaintiff brings this action pursuant to Rule 23(b) (2) of the Federal Rules of Civil Procedure, on her behalf and on behalf of other persons similarly situated who have been denied or been dismissed from employment by the Martin Company at its plant and/or other facilities located in the State of Florida, and in and around the City of Orlando. There are common questions of law and fact affecting the rights of other female citizens in this class who are and have been limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of sex. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by the plaintiff.

III

This is a proceeding for a preliminary and permanent injunction restraining defendant from maintaining a policy, practice, custom or usage of discriminating against the plaintiff, and other female persons with pre-school age children similarly situated, because of sex with respect to compensation terms, conditions and privileges of employment and ways which deprive the plaintiff and other female persons with pre-school age children of equal employment opportunities and otherwise adversely affect their status as employees because of sex.

IV

Plaintiff, Ida Phillips, is a citizen of the United States of America and she presently resides in the City of Jacksonville in the State of Florida.

V

Defendant, Martin Company is a corporation doing business in Orlando, Florida in pursuance of authority granted it by the State of Florida. It has a parent office at San Lake Road, Orlando, Florida. The defendant is an employer within Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-(b), in that it is engaged in an industry affecting commerce and employs more than one hundred (100) persons.

VI

The plaintiff applied for employment with the defendant on September 6, 1966 with no success. Plaintiff submitted her application pursuant to an ad in the local newspaper advertising positions for 100 assembly trainees.

The only qualification specified was a "high school background". Plaintiff answered the advertisement by going to the defendants office on September 6, 1966 and filling out an application. When she gave her application to the receptionist, she was told that defendant was not considering applications from women with pre-school age children. Defendant refused to employ plaintiff solely on account of her sex.

VII

The plaintiff originally filed a charge in October 5, 1966 with the Equal Employment Opportunity Commission in Washington, D. C. The charge alleged a violation by the defendant of plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U. S. C. Sections 2000e et seq. Attached is a copy of said charge hereto as Exhibit "A". The charge was referred to the Atlanta Regional Office of the Equal Employment Opportunity Commission on or about September 25, 1967. On July 28, 1967 the Equal Employment Opportunity Commission, Washington, D. C. found probable cause to credit the allegation of plaintiff. The Equal Employment Opportunity Commission on July 14, 1967 found reasonable cause to believe that the defendant had violated Title VII of the Civil Rights Act of 1964 by its refusal to consider a woman with pre-school age children for employment. Attached hereto as Exhibit "B" is a copy of the decision of the commission. The commission notified the plaintiff by letter under date of November 9, 1967 that the commission had not achieved voluntary compliance by defendant through conciliation as provided by Title VII of the Civil Rights Act of 1964 and that plaintiff was entitled to initiate a civil action in a United States District Court, as provided by Section 2000e-5(f) of the

Civil Rights Act of 1964. Attached hereto as Exhibit "C" is a copy of this letter.

VIII

Plaintiff and the class she represents have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury because of defendants policy, practice, customs and usage as set forth herein.

WHEREFORE, the plaintiff respectfully prays this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiff and the class she represents a preliminary and permanent injunction enjoining the defendant, Martin Company, Orlando, Florida, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining any policy, practice, custom and usages of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of the plaintiff and others similarly situated to enjoy equal employment, treatment, advancement or training for advancement as secured by Title VII of "The Civil Rights Act of 1964," 42 U. S. C. Sections 2000e et seq.

2. Require defendant to employ plaintiff retroactive to the time of defendants wrongful refusal to employ her, with back pay to said time.

3. Allow plaintiff her costs herein, including reasonable attorney's fees and other additional relief as may appear to this Court to be equitable and just.

/s/ IDA PHILLIPS
Plaintiff

JOHNSON & MARSHALL
by /s/ REESE MARSHALL
Attorney for Plaintiff
625 West Union Street
Jacksonville, Florida 32202

Sworn to and subscribed before me
this 12th day of December, 1967.

/s/ EDWINA L. WAY
Notary Public
My Commission Expires;

Exhibit "A" Annexed to Complaint

(Letter Dated July 28, 1967)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

[EMBLEM]

JUL 28 1967

IN REPLY REFER TO:
Case No. 6-9-7758
Martin Company
Orlando, Florida

Mrs. Ida Joane Phillips
5301 Indian Hill Road
Orlando, Florida 32808

Dear Mrs. Phillips:

The Commission has investigated your charge of employment discrimination and has found reasonable cause to believe that an unlawful employment practice with the meaning of Title VII of the Civil Rights Act of 1964 has been committed. The Commission will attempt to eliminate this practice by conciliation as provided in Title VII. You will be kept informed of the progress of conciliation efforts.

Sincerely yours,

/s/ ERIC W. SPRINGER
Eric W. Springer
Director of Compliance

Exhibit "B" Annexed to Complaint

(Decision of Commission)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

[EMBLEM]

Mrs. Ida Phillips
Charging Party

Case No. 6-9-7758
AT 6-10-811

vs.

Martin Company
Orlando, Florida
Respondent

Date of alleged violation: September 6, 1966
Date of filing: October 5, 1966
Date of service of charge: January 10, 1967

DECISION

Summary of Charge

Charging Party alleges that she was discriminated against on the basis of her sex (female) as follows:

> When she applied for a job with Respondent in response to a newspaper advertisement, the receptionist told her that her application could not be considered because Respondent was not hiring people with preschool age children.

Summary of Investigation

Respondent is engaged in an industry affecting commerce and is within the jurisdiction of the Commission. Respondent's primary business is aerospace research and manu-

facturing. With its more than 9000 employees, Respondent is the largest employer in the Orlando, Florida area.

In September, 1966, Respondent placed a notice in the local paper advertising openings for 100 assembly trainees. The only qualification specified was a "high school background." Charging Party answered the advertisement by going to Respondent's offices on September 6, 1966, and filling out an application. When she gave her application to the receptionist, she was told that Respondent was not considering applications from people with pre-school age children.

At the time of the investigation, Respondent contended that Charging Party was not qualified for the position advertised since she had no relevant work experience. Charging Party's work experience was not, however, the reason originally given (one line illegible)
work experience was not, however, the reason originally given for failure to consider her application. The evidence indicates that it was because of her young children that she was prevented from being considered.

Respondent stated that its position on applicants with pre-school age children does not constitute a formal rule. However, Respondent admitted that it prefers not to hire women who have young children. This policy is based on Respondent's "past experience" with mothers of small children who, Respondent asserts, have inflexible schedules and often lose time from work caring for their children. No evidence was submitted to support these contentions.

The investigation did disclose that the determinant reason for rejecting Charging Party's application was the fact that she had a pre-school age child. The Commission found in a case with similar facts[1] that it is an unlawful practice to refuse to employ female applicants merely because

Exhibit "B" Annexed to Complaint

they are mothers of pre-school age children. Respondent's action in excluding women with young children from consideration from employment, solely because of Respondent's past experience, is therefore a violation of Title VII.

Decision

Reasonable cause exists to believe that Respondent violated Title VII of the Civil Rights Act of 1964 by its refusal to consider a woman with pre-school age children for employment.

For the Commission

(signed Marie D. Wilson).
Marie D. Wilson, Secretary

JUL 14 1967

Date

Exhibit "C" Annexed to Complaint

(Notice of Right to Sue)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20506

[EMBLEM]

CERTIFIED MAIL RETURN
RECEIPT REQUESTED

NOTICE OF RIGHT TO SUE
WITHIN 30 DAYS

NOV 9 1967

In Reply Refer To:
Case No. 6-9-7758 (AT 6-10-811)
Martin Company
Orlando, Florida

Mrs. Ida Phillips
1445 Domas Drive
Jacksonville, Florida 32211

Dear Mrs. Phillips:

This is to advise you that conciliation efforts in the above matter have failed to achieve voluntary compliance with Title VII of the Civil Rights Act of 1964. Pursuant to Section 706(e) of the Act, you are hereby notified that you may, within thirty (30) days of the receipt of letter, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney, the Federal Court is authorized in its discretion, to appoint an attorney to represent you and to authorize the commencement of the suit without payment of fees, costs or security. If you decide to institute suit and find you need such assistance,

Exhibit "C" Annexed to Complaint

you may take this letter, along with the Commission determination of reasonable cause to believe Title VII has been violated, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

Please feel free to contact the Commission if you have any questions about this matter.

Sincerely,

/s/ ROBERT L. RANDOLPH
Robert L. Randolph (Acting)
Director of Compliance

Motion to Dismiss, Motion to Strike, and Request for Oral Argument

(Filed Jan. 10, 1968)

Motion To Dismiss

Comes now the defendant, MARTIN MARIETTA CORPORATION, and moves the court to dismiss the complaint, and for grounds states:

1. The complaint was not filed within the time provided by law.

2. The complaint does not state a class action against the defendant.

3. The complaint fails to state a claim upon which relief can be granted.

Motion To Strike

Defendant moves to strike the following from the complaint:

1. The words "national origin" from paragraph I.

Request For Oral Argument

Pursuant to 7(c) of the General Rules, defendant requests this motion be set down for oral argument.

/s/ J. THOMAS CARDWELL
J. Thomas Cardwell, of
AKERMAN, SENTERFITT, EIDSON, MESMER, ROBBINSON & WHARTON
506 First National Bank Building
P.O. Box 231
Orlando, Florida 32802

Attorneys for Defendant

Order

(Filed Feb. 27, 1968)

This cause came on pursuant to due notice on the application of the plaintiff for a temporary injunction and the motions of the defendant to dismiss the complaint and to strike certain portions thereof. After considering the complaint, the motions of the defendant and the memorandum filed in support of said motions and the plaintiff not offering any evidence in support of her application for temporary injunction, it is,

ORDERED that the motion to dismiss the complaint be and is hereby denied and the defendant is granted ten (10) days from date hereof within which to file an answer to the complaint as it stands after the ruling hereinafter set forth on the motion to strike; it is further,

ORDERED that those portions of the complaint concerning the alleged denial of a right based upon the claim that the plaintiff was discriminated against because she has pre-school age children, be and are hereby stricken, it being the holding of this Court that discrimination based upon an applicant having pre-school age children is not a discrimination based upon sex in violation of the Civil Rights Act. However, the allegation alleging a violation of the Civil Rights Act based solely on discrimination because of sex remains unstricken; it is further

ORDERED that the portions of the complaint alleging the action to be a class action are stricken and this case shall proceed with the plaintiff suing solely in her individual capacity; and it is further,

ORDERED that the application for temporary injunction be and is hereby denied, there being no evidence offered in

support thereof, but because it is alleged that this case comes under the Civil Rights Act, the proceedings will be expedited and it is for that reason that only ten (10) days are granted for the filing of the answer, rather than the usual twenty (20) days.

DONE and ORDERED in Chambers at Orlando, Florida, this 26th day of February, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Answer

(Filed March 8, 1968)

Comes now MARTIN MARIETTA CORPORATION, by and through its undersigned attorneys, and answers the Complaint as follows:

1. Referring to Paragraph I of the Complaint, defendant admits Paragraph I except that it denies that this action is brought to redress discrimination on the basis of national origin.

2. Paragraph II of the Complaint was struck by the Court's Order of February 26, 1968.

3. Referring to Paragraph III of the Complaint, defendant admits this is an action for an injunction but denies each and every allegation of discrimination on the basis of sex contained therein.

4. Referring to Paragraph IV of the Complaint, defendant is without knowledge of the allegations contained therein.

5. Referring to Paragraph V of the Complaint, defendant denies that its corporate name is "Martin Company", but rather alleges that it is the Martin Marietta Corporation, and denies that it has a parent office in Orlando, Florida. The other allegations of Paragraph V are admitted.

6. Referring to Paragraph VI of the Complaint, defendant admits that plaintiff applied without success for employment with the defendant on September 6, 1966; that the newspaper advertisement specified high school background was required; and that the receptionist told plaintiff applications from women with pre-school age

children were not being considered. Defendant denies that plaintiff was refused employment solely on the basis of her sex. Defendant is without knowledge of the other allegations of this paragraph.

7. Referring to Paragraph VII of the Complaint, defendant admits that plaintiff filed a charge with the Equal Employment Opportunity Commission on October 5, 1966, alleging defendant had violated Title VII of the Civil Rights Act of 1964; that on July 14, 1967 the Equal Employment Opportunity Commission found reasonable cause to believe defendant had violated said act and that by letter dated November 9, 1967 plaintiff was notified conciliation efforts had failed. Defendant is without knowledge of any referral of the said charge to the Atlanta Regional Office of the Equal Employment Opportunity Commission. Defendant denies the allegations contained in this paragraph and in the documents referred to therein as they relate to discrimination on the basis of sex.

8. Referring to Paragraph VIII of the Complaint, defendant denies the allegations contained therein as they relate to the plaintiff individually. Those portions relating to a class action were struck by the Court's Order of February 26, 1968.

Affirmative Defense

By way of further defense, defendant alleges that this action is barred in that this suit was not timely filed pursuant to 28 U.S.C.A. § 2000e-5(e).

Motion for Summary Judgment

(Filed May 31, 1968)

Defendant, MARTIN MARIETTA CORPORATION, moves this Court for entry of summary judgment in its favor against the plaintiff, IDA PHILLIPS, and as grounds therefor states that the pleadings, interrogatories and affidavit on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Request for Oral Argument

Pursuant to Rule 7(C) of the Local Rules, defendant requests oral argument on the above motion.

Affidavit of Donald C. Parsons

STATE OF FLORIDA
COUNTY OF ORANGE

Before me, the undersigned authority, on this day personally appeared DONALD C. PARSONS, who, being first duly sworn, deposes and says:

1. My name is Donald C. Parsons and I am employed by the Martin Marietta Corporation at Orlando, Florida.

2. I am Manager of the Employment Department and have held such position for over two years.

3. In my capacity as Manager of the Employment Department I am personally responsible for, and in charge of, the hiring of all personnel.

4. In my capacity as Manager of the Employment Department I was cognizant of the terms of Title VII of the Civil Rights Act of 1964, including its prohibition against the discrimination in employment based on sex, and at all times I followed the Company policy of compliance with that Statute.

5. I was personally in charge of the hiring of assembly trainees during the relevant period.

6. Approximately 75 to 80% of all those hired as assembly trainees during the relevant period were women.

7. Approximately 70 to 75% of all the job applicants for assembly trainees were women.

8. I was personally at the Martin Marietta Corporation's Orlando facility, supervising the hiring of assembly trainees at the time Mrs. Phillips sought employment.

Affidavit of Donald C. Parsons

9. At the time that Mrs. Phillips sought employment no one was discriminated against because of sex and the fact that she was not offered employment was in no respect based on her sex.

Further affiant sayeth not.

/s/ DONALD C. PARSONS
Donald C. Parsons

Sworn to and subscribed
before me this 30th day
of May, 1968.

SHIRLEY R. MCGILL
Notary Public
My Commission expires: Nov. 3, 1971

SEAL

Request for Admission

(Filed June 26, 1968)

Comes Now the plaintiff, Ida Phillips, and pursuant to Rule 36 of the Rules of Civil Procedure, requests the defendant within ten (10) days after service of this request to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees?

Ruling on Motion for Summary Judgment

(Filed July 9, 1968)

This cause came on before the Court for hearing July 8, 1968, on the motion of the defendant, MARTIN MARIETTA CORPORATION, for summary judgment. The complaint as originally filed alleged that the plaintiff was discriminated against because of an alleged policy of the defendant not to hire women with pre-school age children. In an order entered February 26, 1968, this Court ruled that the discrimination raised by that allegation was not the sort of discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000(e) et seq., and that the allegation raising discrimination based on the fact that the plaintiff had pre-school children should be stricken. The case proceeded on the basis of alleged discrimination based on the plaintiff's sex alone.

In support of its motion for summary judgment, the defendant has filed affidavits and answers to interrogatories showing that the defendant has hired 479 women for the same job for which the plaintiff sought to apply during the relevant period of time; that 70-75% of the applicants for that position were women; that 75-80% of the employees holding that position were women, and that there is no basis in this record to support a finding that the defendant discriminated against this plaintiff because she is a woman.

The plaintiff maintains that a response to a request for admission filed herein June 26, 1968, would be sufficient to withstand defendant's motion for summary judgment. That request seeks an admission from the defendant "(t)hat the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees?" Although the time for objecting or responding to that request for admission has not expired at this time, the

Court, for purposes of the motion for summary judgment accepts that request for admission as admitted, and finds that the defendant does employ males with pre-school age children in the position of Assembly Trainee. It is, however, the opinion of the Court that such fact is irrelevant and immaterial to the issue before the Court. The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies.

The plaintiff having submitted no affidavits tending to show that the defendant discriminated against the plaintiff because the plaintiff is a woman, it is the opinion of the Court that there is no genuine dispute of material fact and that the defendant is entitled to summary judgment as a matter of law. It is, therefore,

ORDERED and ADJUDGED that the motion of the defendant, Martin Marietta Corporation, for summary judgment be and is hereby granted; judgment in accordance with this opinion will be entered separately.

DONE and ORDERED in Chambers at Orlando, Florida, this 8th day of July, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Judgment

(Filed July 9, 1968)

This cause having been duly heard on defendant's motion for summary judgment and the Court having ruled that the defendant is entitled to summary judgment, it is in accordance therewith,

ORDERED and ADJUDGED that the plaintiff take nothing; that the action be dismissed on the merits, each party to bear its own costs.

DONE and ORDERED in Chambers at Orlando, Florida, this 8th day of July, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Motion for Leave to Proceed in Forma Pauperis

(Filed July 31, 1968)

Plaintiff moves this Court for an order granting leave to appeal from the Judgments entered on February 26, 1968 and July 8, 1968 without prepayment of costs and fees and without giving security therefor. The grounds of this Motion are as follows:

The plaintiff is a citizen of the United States residing at Jacksonville, Duval County, Florida, and is without property or money with which to pay the costs of appeal and is unable to pay costs or fees on appeal or the expense of furnishing a stenographic transcript as more fully appears from plaintiff's Affidavit attached hereto.

Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

STATE OF FLORIDA,
COUNTY OF DUVAL, *ss.*:

I, IDA PHILLIPS, being first duly sworn, depose and say, that I am the plaintiff in the above entitled case; that in support of my Motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are as follows:

1. The District Court erred in striking those portions of plaintiff's complaint concerning the alleged denial of a right based upon a claim that plaintiff was discriminated against because she had pre-school age children.

2. That the District Court erred in striking those portions of the plaintiff's complaint alleging the action to be a class action.

3. The District Court erred in granting Summary Judgment for the defendants.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes

(a) Amount of salary per month and name and address of employer. $120.00—Derby House, 5940 Merrill Road, Jacksonville, Florida.

2. Have you received within the past 12 months any income from business, profession or other form of self-

employment. Or in form of rent payment, interest, dividens or other source? No

3. Do you own any cash or checking or savings account? No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? Real Property—Buying Home, $12,000.00

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Grace McAllister	5 years	Daughter
Reggie McAllister	17 years	Son
Ronnie McAllister	15 years	Son
Vera McAllister	14 years	Daughter
Alfred McAllister	13 years	Son
Bryan McAllister	11 years	Son
Kenneth McAllister	9 years	Son

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

/s/ Ida Phillips
Ida Phillips—Affiant

Sworn to and Subscribed before me
this 29th day of July, A. D. 1968.

/s/ Edwina L. Way
Notary Public
My Commission Expires:

Order

(Filed Aug. 13, 1968)

This cause came on before the Court for hearing August 12, 1968, on the motion of the plaintiff for leave to appeal in forma pauperis. Having considered plaintiff's affidavit and having heard plaintiff's testimony, it is,

ORDERED that the motion of the plaintiff for leave to appeal in forma pauperis be and is hereby granted, provided, however, that should the defendant prevail upon the final disposition of this action, the plaintiff shall reimburse the United States of America for the costs of her appeal upon terms and conditions to be determined at the appropriate time.

DONE and ORDERED in Chambers at Orlando, Florida, this 13th day of August, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Notice of Appeal

(Filed Aug. 12, 1968)

Notice is hereby given that Ida Phillips, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgments entered in this action on February 26, 1968 and July 8, 1968 whereby:

(1) The District Court erred in striking those portions of plaintiff's complaint concerning the alleged denial of a right based upon a claim that plaintiff was discriminated against because she has pre-school age children.

(2) That the District Court erred in striking those portions of the plaintiff's complaint alleging the action to be a class action.

(3) The District Court erred in granting Summary Judgment for the defendants.

Opinion by Court of Appeals for the Fifth Circuit, May 26, 1969

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,
Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(May 26, 1969)

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: The present action is before us on an appeal from the granting of a motion for summary judgment by the District Court. The original complaint under Section 706 (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5 (e), alleged that appellee Martin Marietta Corporation had violated Section 703,

---

*Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

42 U.S.C. § 2000e-2 when it wrongfully denied appellant Phillips employment because of sex. An ancillary issue raised concerns the propriety of the District Court's allowing the appeal in forma pauperis conditioned on appellant Phillips' reimbursing the United States in the event of an unsuccessful appeal.

Ida Phillips, the appellant, submitted an application for employment with the appellee, Martin Marietta Corporation, for the position of Assembly Trainee pursuant to an advertisement in a local newspaper. When Mrs. Phillips submitted her application in an effort to gain employment, an employee of Martin Marietta Corporation indicated that female applicants with "pre-school age children" were not being considered for employment in the position of Assembly Trainee. However, males with "pre-school age children" were being considered. A charge was thereafter filed with the Equal Employment Opportunity Commission alleging that plaintiff-appellant's rights under Title VII of the Civil Rights Act of 1964[1] had been violated. The Commission found reasonable cause to believe that defendant Martin Marietta Corporation had discriminated on the basis of sex, and plaintiff filed a class suit in the District Court.

The District Court granted a motion to strike that portion of the complaint which alleged that discrimination against women with pre-school age children violated the statute, and it refused to permit the case to proceed as a class action. The complaint was not

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[1] 42 U.S.C. § 2000e, et seq.

dismissed, however, and it was left open to plaintiff to submit evidence to prove her general allegation that she had been discriminated against because of her sex.

Defendant then moved for summary judgment, supported by an uncontroverted showing that, while 70 to 75 percent of those who applied for this position were women, 75 to 80 percent of those holding the positions were women. Defendant claimed that this established that there was no discrimination against women in general, or against plaintiff in particular. The Court granted the motion on the ground that there were no material issues of fact which would support a conclusion of discrimination on the basis of sex.

The primal issue presented for consideration is whether the refusal to employ women with pre-school age children is an apparent violation of the 1964 Civil Rights Act's proscription of discrimination based on "sex". The pertinent portion of the Act, 42 U.S.C. 2000e-2, reads as follows:

> (a) It shall be unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex or national origin;

The defendants do not choose to rely on the "bona fide occupational qualification" section of the Act,[2] but, instead, defend on the premise that their established standard of not hiring women with pre-school age children is not per se discrimination on the basis of "sex".

The question that confronts us is a novel one upon which the courts have been asked to rule only on a

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[2] 42 U.S.C. § 2000e-2(e):

Unlawful employment practices — Employer practices. Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

few occasions. However, none of the cases reviewed by this Court deal with the specific issue presented here. In the case of *Cooper v. Delta Airlines, Inc.*, 274 F. Supp. 781 (E.D. La., 1967), appeal dismissed, No. 25,698, 5 Cir., Sept. 1968 the District Court held that an airlines hostess who is fired because she was married has not been discriminated against on the basis of sex. However, Delta did not consider men for the positions in question, and therefore, unlike the case *sub judice*, the discrimination was between different categories of the same sex. Recently the Fifth Circuit was called upon to review a problem of a kindred nature in *Weeks v. Southern Bell Telephone & Telegraph Co.*, No. 25,725 (5 Cir., Mar. 4, 1969). However, that case is inapposite to the case at bar in that the defendant in *Weeks*, supra, established its defense on the "bona fide occupational qualification", rather than relying solely on 42 U.S.C. 2000e-2a (1).

The position taken by the Equal Employment Opportunity Commission is that where an otherwise valid criterion is applied solely to one sex, then it automatically becomes a per se violation of the Act. In its argument, the defendant outlines the proposal that before a criterion which is not forbidden can be said to violate the Act, the court must be presented some evidence on which it can make a determination that women as a group were treated unfavorably, or that the applicant herself was singled out because she was a woman. However, neither litigant is able to present substantive support for its theory. Both cite selected sections from the congressional history of the bill; however, a perusal of the record in Congress will reveal that the

word "sex" was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress. To buttress its position, the Commission cites to its own regulations; however, it is well established administrative law that the construction put on a statute by an agency charged with administering it is entitled to deference by the courts, but the courts are the final authorities on issues of statutory construction. *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968).

We are of the opinion that the words of the statute are the best source from which to derive the proper construction. The statute proscribes discrimination based on an individual's race, color, religion, sex, or national origin. A per se violation of the Act can only be discrimination based solely on one of the categories i.e. in the case of sex; women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin. It becomes the function of the courts to study the conditioning of employment on one of the elements outlined in the statute coupled with the additional requirement, and to determine if any individual or group is being denied work due to his race, color, religion, sex or national origin. As was acknowledged in *Cooper*, supra, 42 U.S.C. 2000e-2 (a) does not prohibit discrimination on any classification except those named within the Act itself.[3] Therefore,

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[3] "The discrimination lies in the fact that the plaintiff is married — and the law does not prevent discrimination against married people in favor of the single ones." *Cooper* v. *Delta Air Lines, Inc.*, 274 F. Supp. 781 (1967).

once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires. However, it is the duty of the employer to produce information to substantiate his defense of non-discrimination. It is emphasized that this issue does not concern the bona fide occupational qualification under which discrimination is admitted by the employer while alleging that such discrimination was justified.

As to the case *sub judice*, as assembly trainee, among other disqualifications, cannot be a woman with pre-school age children. The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm.

Decision in this case ultimately turns, of course, upon the reach of the Congressional intention underlying the statutory prohibition of discrimination in employment based upon sex. Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school

age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the "bona fide employment disqualification" provision of the statute.

The Commission, however, in its appearance before us has rejected this possible reading of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon "sex" as Congress intended that term to be understood, we have no hesitation in choosing the latter. The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.

In conclusion, we address ourselves to the condition attached to the *in forma pauperis* grant. Once the District Court has determined that the application to proceed in forma pauperis is meritorious, the discretion of the Court is closed and the application should be

granted. Title 28, U.S.C.A. 1915; *Williford v. People of State of California*, 329 F. 2d 47 (9 Cir., 1964). The condition that appellant Phillips must reimburse the United States in the event of an unsuccessful appeal is hereby removed from the grant to proceed in forma pauperis.

AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26825

D. C. Docket No. Civ. 67-290-Orl

IDA PHILLIPS,

Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Before:

GEWIN, McGOWAN* and MORGAN,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 26, 1969

Issued as Mandate: JUN 17 1969
Re-Issued as Mandate: DEC 11 1969

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* Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

Letter Recalling Mandate

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

July 29, 1969

To COUNSEL LISTED BELOW

No. 26825—*Ida Phillips* v. *Martin Marietta Corp.*

Gentlemen:

The Court has directed that I send this letter to counsel.

Pending further order of the Court, the mandate heretofore issued is being recalled.

At the request of one of the members of the Court in active service, the parties are requested to file and exchange further briefs that they consider appropriate or necessary with respect to the issues decided in the Court's opinion of May 26, 1969, with particular reference to the standard to be applied under the statute forbidding discrimination because of sex.

Letter Recalling Mandate

These briefs should be filed within twenty (20) days from this date and may be filed in typewritten form in 15 copies.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk.

By GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Chief Deputy Clerk

GFG:adg

Mr. Reese Marshall
Messrs. David R. Cashdan
Philip B. Sklover
Messrs. J. Thomas Cardwell
George T. Eidson, Jr.

cc-Mr. Wesley R. Thies, *Clerk*

Order by Court of Appeals for Fifth Circuit Denying Petition for Rehearing, October 13, 1969

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,
Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(October 13, 1969)

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules

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*From the D.C. Circuit, sitting by designation.

of Appellate Procedure; Local Fifth Circuit Rule 12); Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, and CARSWELL, Circuit Judges.

BROWN, Chief Judge, with whom AINSWORTH and SIMPSON, Circuit Judges, join, dissenting:

I dissent from the Court's failure to grant rehearing en banc. [1]

I.

Without regard to the intrinsic question of the correctness of the Court's decision and opinion, this is one of those cases within the spirit of FRAP 35 and 28 USCA §46 which deserves consideration by the full Court.

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[1] Presumably because it was *amicus* only and not a party, the Government did not seek either rehearing or rehearing en banc. For understandable reasons the private plaintiff, Ida Phillips, who has the awesome role of private Attorney General without benefit of portfolio, or more important, an adequate purse, presumably felt that she had fulfilled her duty when the Court ruled. Subsequently, on a poll being requested, FRAP 35; 5th Circuit Rule 12, the Government filed a strong brief attacking the Court's decision. Likewise, the private plaintiff's counsel filed a persuasive brief. This merely emphasizes that it has been members of this Court, not the parties, who have raised questions about the Court's decision. This is in keeping with 28 USCA §46 and FRAP 35.

Order by Court of Appeals for Fifth Circuit Denying Petition for Rehearing, October 13, 1969

As the records of this Court reflect, we have within the very recent months had to deal extensively with Title VII civil rights cases concerning discrimination in employment on account of race, color, sex and religion.[2] Court decisions on critical standards are of unusual importance. This is so because, except for preliminary administrative efforts at conciliation and the rare pattern or practice suit by the United States,[3] effectuation of Congressional policies is largely committed to the hands of individual workers who take on the mantle of a private attorney general[4] to vindicate, not individual, but public rights.

This makes our role crucial. Within the proper limits of the case-and-controversy approach we should lay down standards not only for Trial Courts, but hopefully also for the guidance of administrative agents in the

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[2]These include the following and those cited therein: Jenkins v. United States Gas Corp., 5 Cir., 1968, 400 F.2d 28; Oatis v. Crown Zellerbach Corp., 5 Cir., 1968, 398 F.2d 496; Pettway v. American Cast Iron Pipe Co., 5 Cir., 1969, 411 F.2d 998; Local 189, United Papermakers and Paperworkers, 5 Cir., 1969, ——— F.2d ——— [No. 25956, July 28, 1969]; United States v. Hayes Internat'l. Corp., 5 Cir., 1969, ——— F.2d ——— [No. 26809, August 19, 1969]; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir., 1969, 408 F.2d 228; Dent v. St. Louis-S.F. Ry., 5 Cir., 1969, 406 F.2d 399.

Also pending before a panel of this Court are two analogous cases under §17 of the Fair Labor Standards Act, 29 USCA §§201 *et seq.*, involving equality of compensation to women: No. 26960, Schultz v. First Victoria Nat'l. Bank; and No. 26971, Shultz v. American Bank of Commerce.

[3]See §707(a), 42 USCA §2000e-6 (a).

[4]See Pettway v. American Cast Iron Pipe Co., note 2, *supra*, 411 F.2d at 1005; Jenkins v. United Gas Corp., note 2, *supra*, 400 F.2d at 32-33.

field, as well as employers, employees, and their representatives.

The full Court should look at the issue here posed. And now in the light of the standard erected — sex if coupled with another factor is acceptable — it is imperative that the full Court look at it.

II.

Equally important, the full Court should look to correct what, in my view, is a palpably wrong standard.

The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may.[5] The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody — and this includes Judges, Solomonic or life tenured — has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

It is the fact of the person being a mother — *i.e.* a woman — not the age of the children, which denies employment opportunity to a woman which is open to a man.

How the Court strayed from that simple proposition is not easy to divine. Not a little of the reason appears to be a feeling that the Court in interpreting §703(a)

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[5]The man would qualify even though as widower or divorcé he had sole custody of and responsibility for pre-school children.

(1), 42 USCA §2000e-2(a) (1), prohibiting sex discrimination,[6] is bound to accept the contention of one of the parties, rather than pick and choose, drawing a middle line, or for that matter reaching independently an interpretation sponsored by no one. Thus, after noting that in the Trial Court and here the Employer did not "choose to rely on the 'bona fide occupational qualification' section of the Act,[7] but, instead, defended on the premise that their established standard of not hiring women with pre-school age children is not per se discrimination on the basis of 'sex'" (*Phillips v. Martin Marietta Corp.*, 5 Cir., 1969, 411 F.2d 1, 2-3),

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[6]Section 703(a) (1) reads as follows:

"(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 USCA §2000e-2(a) (1).

[7]Section 703 (e) states:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. * * *"

42 USCA §2000e-2(e).

the Court virtually acknowledges the patent discrimination based on biology. The Court states: "Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the 'bona fide employment disqualification' provision of the statute." 411 F.2d at 4.

But in what immediately followed the Court then does a remarkable thing. Referring to EEOC (appearing only as *amicus*), it states: "The Commission, however, in its appearance before us has rejected this possible reading[8] of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, * * * we have no hesitation in choosing the latter." 411 F.2d at 4.

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[8]Such a reading is certainly not rejected by EEOC on this rehearing. The supplemental brief (pp. 9-10) recognizes the employer's right to claim and prove the §703(e) "business necessity" exemption. (See note 7, *supra*).

It is this self-imposed interpretive straightjacket which, I believe, leads the Court to the extremes of "either/or" outright per se violation with no defense or virtual complete immunity from the Act's prohibitions. This it does through its test of "sex plus": "[1] A per se violation of the Act can only be discrimination based solely on one of the categories *i.e.* in the case of sex; women vis-a-vis men. [2] When *another* criterion of employment *is added* to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin."[9] 411 F.2d at 3-4 (Emphasis supplied).

Reducing it to this record the Court characterizes the admitted discrimination in this way. "The discrimination was based on a *two-pronged* qualification, *i.e.*, a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the *coalescence* of these *two elements* that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm." 411 F.2d at 4 (Emphasis supplied).

If "sex plus" stands, the Act is dead.[10] This follows from the Court's repeated declaration[11] that the em-

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[9]By supplemental brief (p. 4, n. 1) EEOC agrees with [1] on "per se" violations.

[10]Of course the "plus" could not be one of the other statutory categories of race, religion, national origin, etc.

[11]See, *e.g.*, "As was acknowledged in *Cooper, supra*, 42 USC 2000e-2(a) does not prohibit discrimination on any classification except those named within the Act itself. Therefore, once the

ployer is not forbidden to discriminate as to non-statutory factors. Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence tests, aptitude tests, etc. And it bears repeating that on the Court's reading, one of these would constitute a complete defense to a charge of §703(a)(1) violation *without* putting on the employer the burden of proving "business justification" under §703(e) (note 7, *supra*).

In addition to the intrinsic unsoundness of the "sex plus" standard, the legislative history refutes the idea that Congress for even a moment meant to allow "non-business justified" discrimination against women on the ground that they were mothers or mothers of pre-school children. On the contrary, mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude.

In the first place, working mothers constitute a large class[12] posing much discussed problems of economics

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employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." 411 F.2d at 4.

[12]Statistics compiled by the Wage and Labor Standards Administration of the United States Department of Labor indicate that working mothers comprise an important and increasing seg-

and sociology. And with this large class and the known practice of using baby-sitters or child care centers, neither an employer nor a reviewing Court can — absent proof of "business justification" (note 7, *supra*) — assume that a mother of pre-school children will, from parental obligations, be an unreliable, unfit employee.[13]

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ment of the Nation's labor resources. In the most recent compilation (March 1967), there were 10.6 million working mothers in the labor force with children under 18 years of age. This is an increase of 6 million over 1950 and an increase of 9.1 million over 1940. Of the total of working mothers in March 1967, 38.9% were mothers of children under 6 years of age and 20.7% were mothers with children under 3 years of age. In numerical terms, 4.1 million working mothers had children under 6 and 2.1 million working mothers had children under 3. *Who are the Working Mothers*, United States Department of Labor, Wage and Labor Standards Administration, p. 2-3 (Leaflet 37, 1968).

[13]The brief of EEOC points out:

"In answering the question: 'What arrangements do working mothers make for child care?', the Department of Labor responded:

> 'In February 1965, 47 percent of the children under 6 years of age were looked after in their own homes and thirty percent were cared for in someone else's home, but only 6 percent received group care in day care centers or similar facilities.'
> *Who are Working Mothers, supra* [Note 12]."

Furthermore, it is the policy of the Administration to encourage unemployed women on public assistance, who have children, to enter the labor market by providing for the establishment of day care centers to enable them to accept offers of employment. On August 8, 1969, President Nixon stated in his address to the Nation on welfare reforms:

> 'As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However, these would be day-care centers with a difference. There is no single ideal to which this Administration is more firmly committed than to the enriching of a child's first five years of life, and, thus helping

Order by Court of Appeals for Fifth Circuit Denying Petition for Rehearing, October 13, 1969

In this and the related legislation on equality of *compensation* for women[14] one of the reasons repeatedly stressed for legislation forbidding sex discrimination was the large proportion of married women and mothers in the working force whose earnings are essential to the economic needs of their families.'[15]

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lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves.' *Text of Nixon's Address to the Nation Outlining His Proposals for Welfare Reform*, N. Y. Times, August 9, 1969, at 10, Col. 6."

Brief for EEOC at 11-12.

[14]Equal Pay Act of 1963, 77 Stat. 56, effective June 11, 1964, 29 USCA §206. See pending cases, note 2 *supra*.

[15]Thus, President Kennedy, in signing the Equal Pay Act, summarized the conditions which necessitated such a law, as follows:

"[T]he average women worker earns only 60 percent of the average wage for men * * *. Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children * * * and for the protection of the family unit * * * Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year — many of them much less. I believe they bear the heaviest burden of any group in our nation. * * *" [Remarks of the President at signing the Equal Pay Act on June 10, 1963, XXI Cong. Q. No. 24, p. 978 (June 14, 1963).]

At the Senate Hearings, Secretary of Labor Wirtz pointed out:

"Women's earnings, in many families, are a substantial factor in meeting living costs. *Married women*, for

Congress could hardly have been so incongruous as to legislate sex equality in employment by a statutory structure enabling the employer to deny employment to those who need the work most through the simple expedient of adding to sex a non-statutory factor.[16]

A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done.

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example, *accounted for over one-half of the total number of women workers in 1962.* Nearly 900,000 working women had husbands who, for various reasons, were not in the labor force, primarily because they were disabled or retired. The proportion of working wives is materially higher among families in the low-income groups." [1963 Senate Hearings, p. 16]

See also Representatives Green (109 Cong. Rec. 9199):

"There are approximately 25 million working women in the labor force today, and we are simply asking, by this legislation, to look at the facts as they face us in 1963, in instances where there is unequal pay. * * * Women are the heads of 4.6 million families in the United States; one-tenth of all the families in this country. Nearly one million working women have husbands who are not employed, mainly because they are disabled or retired. Nearly 6 million working women are single. The proportion of married women who work is materially higher in the low-income families, and, according to the testimony that was presented to the committee, some 7.5 million women workers supplement the income of male wage earners who make less than $3,000 a year. Women's wages average less than two-thirds of the wages paid men."

[16]Too much emphasis cannot be given to the employer's right to claim and prove the §703(e) "business justification" exemption (see note 7, *supra*). This was not done, but on remand it should be open to the employer here.

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Clerk's Certificate

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,

Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing page contain a full, true and complete copy of the following papers: Original Record on Appeal, Argument and Submission, Opinion of the Court, Judgment, Letter recalling mandate pending further order of the Court, and Opinion-Order Denying Petition for Rehearing and Petition for Rehearing En Banc; in the above cause in this Court as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals

Clerk's Certificate

at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this date.

EDWARD W. WADSWORTH
Clerk of the United States Court of Appeals for the Fifth Circuit.

Date: December 17, 1969.

By Signature Illegible
Deputy Clerk

Order Allowing Certiorari—March 2, 1970

SUPREME COURT OF THE UNITED STATES

No. 1058—October Term, 1969

IDA PHILLIPS,

Petitioner,

vs.

MARTIN MARIETTA CORPORATION,

Respondent.

The petition for a writ of certiorari is granted and the case is placed on the summary calendar.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

Attorneys for Petitioner

GEORGE COOPER
435 West 116th Street
New York, New York
Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	4
I. The Decision Below Is Based Upon An Erroneous Interpretation of Title VII of the Civil Rights Act of 1964 Which Impairs Its Effectiveness and Conflicts in Principle With Other Court of Appeals Decisions	5
II. The Principle Established by the Court of Appeals Decision Threatens the Effectiveness of the Entire Federal Fair Employment Law	9
Conclusion	12
Appendix—	
Opinion of the District Court	1a
Opinion of the United States Court of Appeals	4a
Per Curiam Opinion Denying Rehearing	12a

Authorities Cited

PAGE

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Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 7

Cox v. United States Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968) 9

International Chemical Workers Union v. Planters Mfg. Co., 259 F. Supp. 365 (N.D. Miss. 1966) 9

Local 53, Heat & Frost Insulators Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) 7, 8

Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969) 8

Udall v. Tallman, 380 U.S. 1 (1965) 9

United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969) 8

Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) 6

Statutes:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e-2(a) 2, 5

42 U.S.C. § 2000e-2(e) 3, 6

Miscellaneous:

110 Cong. Rec. 7213 (1964) 7

PAGE

Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969) 7

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Opinion of the General Counsel of the EEOC, CCH Empl. Prac. Guide ¶ 1219 9

Peterson, *Working Women*, 93 Daedalus 671 (1964) 11

Rosenfeld and Perrella, *Why Women Start and Stop Working: A Study in Mobility*, Monthly Labor Review, Sept. 1965 10

U. S. Department of Labor, Bull. No. 290, 1965 *Handbook on Women Workers* (1965) 10, 11

In the

Supreme Court of the United States

October Term, 1969

No. .....

Ida Phillips,

Petitioner,

—v.—

Martin Marietta Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Ida Phillips respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 26, 1969.

Opinions Below

The opinion of the Court of Appeals is reported at 411 F.2d 1 and is reprinted in the Appendix. The Denial of rehearing and accompanying dissent of Chief Judge Brown and Judges Ainsworth and Simpson, not yet reported, and the opinion of the District Court for the Middle District of Florida, also not reported, appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered May 26, 1969. A timely request for rehearing, initiated by a member of the Court, was denied October 13, 1969, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the sex discrimination prohibition of § 703, Civil Rights Act of 1964, is violated by refusal to hire all women with preschool children while hiring men of the same class, where the distinction does not purport to be based on a bona fide occupational qualification.

Statutory Provisions Involved

United States Code, Title 42

§2000e-2(a) [§703(a) of Civil Rights Act of 1964]

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of

such individual's race, color, religion, sex, or national origin.

§2000e-2(e) [§703(e) of Civil Rights Act of 1964]

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Statement of the Case

Ida Phillips, the petitioner, applied for an Assembly-Trainee job with Martin Marietta Corporation, the respondent (hereinafter "Martin"). She had a high school background, the only specified prerequisite to the job. However, Martin refused to accept her application, stating that it did not hire women with "pre-school age children" for this job, although men with pre-school children were hired. Moreover, it does not appear that respondent hires women whose pre-school children may be cared for, for example, by a grandmother or older sibling or day care center. Nor, does respondent apparently even inquire concerning whether a male applicant for employment is a widower with a pre-school child or whether the wife of a married employee with a child is employed or otherwise not in full-time charge of the child.

Mrs. Phillips complained that this constituted unlawful sex discrimination under the Civil Rights Act of 1964. The District Court struck her allegations regarding the pre-school children rule as "irrelevant and immaterial" and ruled for Martin on summary judgment when she could introduce no other evidence of sex discrimination. The Court of Appeals affirmed, holding that this discrimination "based on a two-pronged qualification, i.e., a woman with pre-school age children" was not discrimination because of sex within the meaning of the Act.

Reasons for Granting the Writ

The decision below is based upon an illogical interpretation of the Civil Rights Act of 1964 which impairs its effectiveness and which conflicts in principle with other Court of Appeals decisions. Although the case involves only dis-

crimination against women, its effect upon the substantial number of Negro women in the work force makes the decision particularly important with respect to the racial discrimination provisions of the law. Moreover, the principle established below threatens the effectiveness of the entire Federal equal employment law. In the words of Chief Judge Brown (dissenting), if the "sex-plus" rule of this case stands, "the Act is dead." Appendix, at 18a. It is important, moreover, that this issue be promptly resolved, to protect the credibility of the regulations of the Equal Employment Opportunity Commission which are directly contradicted by the decision below.

I.

The Decision Below Is Based Upon an Erroneous Interpretation of Title VII of the Civil Rights Act of 1964 Which Impairs its Effectiveness and Conflicts in Principle With Other Court of Appeals Decisions.

The prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 does not prohibit only flat refusals to hire women. It is unlawful for an employer "otherwise to discriminate" against women. See §703(a), 42 U.S.C. §2000e-2(a). The District Court attempted to justify its decision by stating that:

> "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies." [1]

While it may be argued that because a woman might have special responsibilities toward her children she may be treated differently in hiring, this fails to take account of

[1] See Appendix, p. 2a, *infra*.

the situation where peculiar responsibilities do not in fact affect job performance. Martin will not hire women with pre-school children if there is a grandmother or older sister at home to care for them, or if a day care center fulfills that purpose. Nor will it hire women with pre-school children even if their husbands are at home unemployed (as often occurs because of lay-off or disability).[2] Martin will apparently hire widowers with pre-school children, but not widows. It will apparently hire men with pre-school children even if their wives are already employed elsewhere. The Martin rule makes no attempt to assess family responsibility in any objective way. The use of such stereotypes is, we submit, the essence of unlawful discrimination prohibited by Title VII.

The reasoning of the District Court would have some merit only if there were differing responsibilities *which affected the job performance of women workers.* Martin might then take account of job performance needs in two ways:

1. The Act enables an employer to impose a different hiring standard for women where the standard is shown to be a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business" (sometimes referred to as BFOQ) under section 703(e), 42 U.S.C. §2000e-2(e). See *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

2. Where a BFOQ cannot be established, there is another lawful way that an employer can take account of family responsibilities. This is through use of a neutral, not sex based, rule regarding such responsi-

[2] Seven percent of working women have husbands who cannot work. See no. 9, *infra*.

bilities. For example, if an employer can show that the family responsibilities of a spouse who is the sole caretaker of children makes such a person an unreliable employee, the employer may consider a general hiring rule that bars jobs to all spouses who are sole caretakers—including widowers as well as widows, and taking into account child care arrangements. This would be neutral and would deal with the specific problem which concerned the employer.[3] Only the slightest change in employee hiring questionnaires would be necessary.

However, Martin has not attempted use of either provision. Martin did not urge a BFOQ defense or even claim that mothers of pre-school children are poor performers on the job.[4] Nor has Martin attempted to apply a neutral standard in this case.

Title VII prohibits double standards, i.e., any practice which unequally restricts the job opportunities of women or which imposes a burden on women not equally imposed on men. See *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Equal Employment Opportunity Commission Sex Discrimination Guidelines*, 29 C.F.R. §§ 1604.2,

[3] Even a neutral rule should be supported by evidence of business need to prevent its use as a device to discriminate against women. See *Local 53, Heat & Frost Insulators Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L.Rev. 1598, 1669-73 (1969).

[4] It is doubtful that Martin could establish a BFOQ defense in this case. The BFOQ exception should be read with a narrow scope to prevent it from violating the law against sex discrimination. See 110 Cong. Rec. 7213 (1964); H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963); Equal Employment Opportunity Commission, Sex Discrimination Guidelines, 29 C.F.R. §1604.1(a) (1968). The point, here, however, is that Martin has not even claimed that the defense is applicable.

1604.3; *cf. Local 53, Heat & Frost Insulators Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) (race discrimination); *Papermakers Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969) (race discrimination); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969) (race discrimination). The practice challenged in this case is a patent violation of this law.

The Court of Appeals justified its decision somewhat differently from the District Court. It reasoned that Mrs. Phillips had not been excluded because of sex but rather because of "sex plus," a two-pronged test: (1) being female and (2) having pre-school children, which coalesced in her case, and that such two-pronged tests did not constitute unlawful discrimination.[5] However, this would make sense only if the law were limited to flat refusals to hire women. Since the law also prohibits extra burdens on women, it should be clear that "sex plus" rules are unlawful. Any rule having sex as one of its factors clearly makes it more difficult for women to obtain jobs than men.[6] The Commission's Guidelines and its rulings make clear that "sex plus" is a violation of Title VII. See *Sex Discrimination Guide-*

[5] See Appendix pp. 9a-10a, *infra*.

[6] The Court of Appeals also relied on evidence that Martin had hired a high percentage of female Assembly-Trainees (75-80%). But, of course, no specific percentage of female employees can per se prove no discrimination. We do not claim that Martin discriminated against all women, but only that it discriminated against a class of women. There are dozens of reasons why a high percentage of women might be employed in spite of the fact that an employer is discriminating against one class of women. For example, the job might be one which appeals to women or one for which women tend to be more qualified. Thus no particular conclusion regarding discrimination can be drawn from the high percentage of females in the position. The only relevant point is that the percentage presumably would and should have been even higher had Martin not applied its discriminatory pre-school children rule which screened out a large group of women from consideration.

lines, 29 C.F.R. § 1604.3; Gen. Counsel Opinion Letter, Sept. 9, 1965, in CCH Empl. Prac. Guide ¶ 1219.29. The Commission filed a brief as *amicus curiae* in this case in the Court of Appeals urging reversal of the District Court decision and filed a supplementary amicus brief supporting a rehearing in the Court of Appeals.

The Court of Appeals' rejection of the Commission's position is inconsistent with established principles calling for deference to the contemporaneous interpretations of an agency charged with enforcement of a complex law. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This principle has unusual importance in the case of the Equal Employment Opportunity Commission. *Cox* v. *United States Gypsum Co.*, 284 F.Supp. 74, 78 (N.D. Ind. 1968); *International Chem. Workers Union* v. *Planters Mfg. Co.*, 259 F.Supp. 365, 366-67 (S.D. Miss. 1966). As an agency with no coercive enforcement powers, the Commission is uniquely dependent on credibility and persuasion in accomplishing its goals.

II.

The Principle Established by the Court of Appeals Decision Threatens the Effectiveness of the Entire Federal Fair Employment Law.

In dissenting from denial of rehearing, Chief Judge Brown, joined by Judges Ainsworth and Simpson, warned:

> "If 'sex plus' stands, the Act is dead."[7]

It is not difficult to see why. Under the Court of Appeals reading, an employer would be free to impose extra educational requirements on women not imposed on men, to require women to pass special tests not given to men, and

[7] See Appendix, p. 18a, *infra*. The rehearing request was brought on *sua sponte* by members of the court.

to meet an infinite variety of other extra standards from which men would be exempted. All of this could be justified on the ground that the discrimination was not against women as such, but rather only against those women who did not meet the special standard, and that this is "sex-plus." Moreover, if "sex plus" is not sex discrimination, then it is difficult to understand why "race-plus" is not exempted from the race discrimination prohibition in the Act. Thus the "sex plus" rule in this case sows the seeds for future discrimination against black workers through making them meet extra standards not imposed on whites.

Even if the "sex plus" rule is not expanded, in its narrow application to mothers of pre-school children it will deal a serious blow to the objectives of Title VII. If the law against sex discrimination means anything it should protect employment opportunities for those groups of women who most need jobs because of economic necessity. Working mothers of pre-schoolers are such a group. Twenty-three per cent of mothers with at least one child under six work, a total of 3.6 million mothers.[8] Studies show that, as compared to women with older children or no children, these mothers of pre-school children were much more likely to have gone to work because of pressing need.[9] Forty-eight percent of pre-school mothers work because of financial necessity and 8% because their husbands are unable to work.[10] Frequently, these women are a key or only source of income for their families. Sixty-eight percent of working women do not have husbands present in

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[8] U.S. Dept. of Labor, 1965 Handbook on Women Workers, Bull. 290, at 2, 42.

[9] Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review, Sept. 1965, at 1077-79, Table 1.

[10] *Ibid.*

the household and two-thirds of these women are raising children in poverty.[11]

Moreover, a barrier to jobs for mothers of pre-schoolers is also offensive to the anti-race discrimination purposes of Title VII. This rule tends to harm non-white mothers more than white mothers.

> "[There is] no tendency for blacks in child bearing ages to retire even temporarily from the labor force. This situation is explained not only by the high incidence of poverty in the Negro community and the economic weakness of Negro males, but also by the large proportion of fatherless families." [12]

As of 1960, thirty-one per cent of non-white married women with children under six were working, as compared with only eighteen per cent of white women in the same category.[13]

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[11] U.S. Dept. of Labor, 1965 Handbook on Women Workers, Bull. 290, at 36.

[12] Ross and Hill, eds., Employment, Race and Poverty, 23 (1967).

[13] Peterson, Working Women, 93 Daedalus 671, 684 (1964).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

Attorneys for Petitioner

GEORGE COOPER
435 West 116th Street
New York, New York

Of Counsel

APPENDIX

APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IDA PHILLIPS,

Plantiff,

vs.

THE MARTIN MARIETTA CORPORATION,

Defendant.

RULING ON MOTION FOR SUMMARY JUDGMENT

This cause came on before the Court for hearing July 8, 1968, on the motion of the defendant, MARTIN MARIETTA CORPORATION, for summary judgment. The complaint as originally filed alleged that the plaintiff was discriminated against because of an alleged policy of the defendant not to hire women with pre-school age children. In an order entered February 26, 1968, this Court ruled that the discrimination raised by that allegation was not the sort of discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000(e) et seq., and that the allegation raising discrimination based on the fact that the plaintiff had pre-school age children should be stricken. The case proceeded on the basis of alleged discrimination based on the plaintiff's sex alone.

In support of its motion for summary judgment, the defendant has filed affidavits and answers to interrogatories

showing that the defendant has hired 479 women for the same job for which the plaintiff sought to apply during the relevant period of time; that 70-75% of the applicants for that position were women; that 75-80% of the employees holding that position were women, and that there is no basis in this record to support a finding that the defendant discriminated against this plaintiff because she is a woman.

The plaintiff maintains that a response to a request for admission filed herein June 26, 1968, would be sufficient to withstand defendant's motion for summary judgment. That request seeks an admission from the defendant "(t)hat the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees?" Although the time for objecting or responding to that request for admission has not expired at this time, the Court, for purposes of the motion for summary judgment accepts that request for admission as admitted, and finds that the defendant does employ males with pre-school age children in the position of Assembly Trainee. It is, however, the opinion of the Court that such fact was irrelevant and immaterial to the issue before the Court. The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies.

The plantiff having submitted no affidavits tending to show that the defendant discriminated against the plaintiff because the plaintiff is a woman, it is the opinion of the Court that there is no genuine dispute of material fact and that the defendant is entitled to summary judgment as a matter of law. It is, therefore,

ORDERED and ADJUDGED that the motion of the defendant, Martin Marietta Corporation, for summary judgment be

and is hereby granted; judgment in accordance with this opinion will be entered separately.

DONE and ORDERED in Chambers at Orlando, Florida, in this 8th day of July, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Copies mailed to:

J. Thomas Cardwell, Esq., P. O. Box 231, Orlando, Florida
Reese Marshall, Esq., 625 West Union Street, Jacksonville, Florida.

Opinion of the United States Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,

Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

(May 26, 1969)

Before

GEWIN, McGOWAN* and MORGAN,

Circuit Judges.

MORGAN, Circuit Judge: The present action is before us on an appeal from the granting of a motion for summary judgment by the District Court. The original complaint under Section 706 (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5 (e), alleged that appellee Martin Marietta Corporation had violated Section 703, 42 U.S.C. § 2000e-2 when it wrongfully denied appellant Phillips employment

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* Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

because of sex. An ancillary issue raised concerns the propriety of the District Court's allowing the appeal in forma pauperis conditioned on appellant Phillips' reimbursing the United States in the event of an unsuccessful appeal.

Ida Phillips, the appellant, submitted an application for employment with the appellee, Martin Marietta Corporation, for the position of Assembly Trainee pursuant to an advertisement in a local newspaper. When Mrs. Phillips submitted her application in an effort to gain employment, an employee of Martin Marietta Corporation indicated that female applicants with "pre-school age children" were not being considered for employment in the position of Assembly Trainee. However, males with "pre-school age children" were being considered. A charge was thereafter filed with the Equal Employment Opportunity Commission alleging that plaintiff-appellant's rights under Title VII of the Civil Rights Act of 1964[1] had been violated. The Commission found reasonable cause to believe that defendant Martin Marietta Corporation had discriminated on the basis of sex, and plaintiff filed a class suit in the District Court.

The District Court granted a motion to strike that portion of the complaint which alleged that discrimination against women with pre-school age children violated the statute, and it refused to permit the case to proceed as a class action. The complaint was not dismissed, however, and it was left open to plaintiff to submit evidence to prove her general allegation that she had been discriminated against because of her sex.

Defendant then moved for summary judgment, supported by an uncontroverted showing that, while 70 to 75 percent

[1] 42 U.S.C. §2000e, et seq.

of those who applied for this position were women; 75 to 80 percent of those holding the positions were women. Defendant claimed that this established that there was no discrimination against women in general, or against plaintiff in particular. The Court granted the motion on the ground that there were no material issues of fact which would support a conclusion of discrimination on the basis of sex.

The primal issue presented for consideration is whether the refusal to employ women with pre-school age children is an apparent violation of the 1964 Civil Rights Act's proscription of discrimination based on "sex". The pertinent portion of the Act, 42 U.S.C. 2000e-2, reads as follows:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex or national origin;

The defendants do not choose to rely on the "bona fide occupational qualification" section of the Act,[2] but, instead, defend on the premise that their established standard of not

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[2] 42 U.S.C. §2000e-2(e):

Unlawful employment practices—Employer practices. Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

(e) Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual,

hiring women with pre-school age children is not per se discrimination on the basis of "sex".

The question that confronts us is a novel one upon which the courts have been asked to rule only on a few occasions. However, none of the cases reviewed by this Court deal with the specific issue presented here. In the case of *Cooper v. Delta Airlines, Inc.*, 274 F. Supp. 781 (E.D. La., 1967), appeal dismissed, No. 25,698, 5 Cir., Sept. 1968 the District Court held that an airlines hostess who is fired because she was married has not been discriminated against on the basis of sex. However, Delta did not consider men for the positions in question, and therefore, unlike the case *sub judice*, the discrimination was between different categories of the same sex. Recently the Fifth Circuit was called upon to review a problem of a kindred nature in *Weeks v. Southern Bell Telephone & Telegraph Co.*, No. 25,725 (5 Cir.,

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for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Mar. 4, 1969). However, that case is inapposite to the case at bar in that the defendant in *Weeks*, supra, established its defense on the "bona fide occupational qualification", rather than relying solely on 42 U.S.C. 2000e-2a (1).

The position taken by the Equal Employment Opportunity Commission is that where an otherwise valid criterion is applied solely to one sex, then it automatically becomes a per se violation of the Act. In its argument, the defendant outlines the proposal that before a criterion which is not forbidden can be said to violate the Act, the court must be presented some evidence on which it can make a determination that women as a group were treated unfavorably, or that the applicant herself was singled out because she was a woman. However, neither litigant is able to present substantive support for its theory. Both cite selected sections from the congressional history of the bill; however, a perusal of the record in Congress will reveal that the word "sex" was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress. To buttress its position, the Commission cites to its own regulations; however, it is well established administrative law that the construction put on a statute by an agency charged with administering it is entitled to deference by the courts, but the courts are the final authorities on issues of statutory construction. *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968).

We are of the opinion that the words of the statute are the best source from which to derive the proper construction. The statute proscribes discrimination based on an individual's race, color, religion, sex, or national origin. A per se violation of the Act can only be discrimination based solely on one of the categories i.e. in the case of sex, women vis-a-vis men. When another criterion of employment is

added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin. It becomes the function of the courts to study the conditioning of employment on one of the elements outlined in the statute coupled with the additional requirement, and to determine if any individual or group is being denied work due to his race, color, religion, sex or national origin. As was acknowledged in *Cooper*, supra, 42 U.S.C. 2000e-2 (a) does not prohibit discrimination on any classification except those named within the Act itself.[3] Therefore, once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires. However, it is the duty of the employer to produce information to substantiate his defense of non-discrimination. It is emphasized that this issue does not concern the bona fide occupational qualification under which discrimination is admitted by the employer while alleging that such discrimination was justified.

As to the case *sub judice*, as assembly trainee, among other disqualifications, cannot be a woman with pre-school age children. The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age

[3] "The discrimination lies in the fact that the plaintiff is married—and the law does not prevent discrimination against married people in favor of the single ones." *Cooper* v. *Delta Air Lines, Inc.*, 274 F. Supp. 781 (1967).

children. It is the coalescence of these two elements that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm.

Decision in this case ultimately turns, of course, upon the reach of the Congressional intention underlying the statutory prohibition of discrimination in employment based upon sex. Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in a treatment under the "bona fide employment disqualification" provision of the statute.

The Commission, however, in its appearance before us has rejected this possible reading of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon "sex" as Congress intended that term to be understood, we have no hesitation in choosing the latter. The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.

Opinion of the United States Court of Appeals

In conclusion, we address ourselves to the condition attached to the *in forma pauperis* grant. Once the District Court has determined that the application to proceed in forma pauperis is meritorious, the discretion of the Court is closed and the application should be granted. Title 28, U.S.C.A. 1915; *Williford* v. *People of State of California*, 329 F. 2d 47 (9 Cir., 1964). The condition that appellant Phillips must reimburse the United States in the event of an unsuccessful appeal is hereby removed from the grant to proceed in forma pauperis.

AFFIRMED.

Per Curiam Opinion Denying Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,
Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

(October 13, 1969)

Before

GEWIN, McGOWAN* and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), Rehearing En Banc is also DENIED.

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* From the D.C. Circuit, sitting by designation.

Per Curiam Opinion Denying Rehearing

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, and CARSWELL, Circuit Judges.

BROWN, Chief Judge, with whom AINSWORTH and SIMPSON, Circuit Judges, join, dissenting:

I dissent from the Court's failure to grant rehearing en banc.[1]

I.

Without regard to the intrinsic question of the correctness of the Court's decision and opinion, this is one of those cases within the spirit of FRAP 35 and 28 USCA § 46 which deserves consideration by the full Court.

As the records of this Court reflect, we have within the very recent months had to deal extensively with Title VII civil rights cases concerning discrimination in employment on account of race, color, sex and religion.[2] Court decisions on critical standards are of unusual importance. This is

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[1] Presumably because it was *amicus* only and not a party, the Government did not seek either rehearing or rehearing en banc. For understandable reasons the private plaintiff, Ida Phillips, who has the awesome role of private Attorney General without benefit of portfolio, or more important, an adequate purse, presumably felt that she had fulfilled her duty when the Court ruled. Subsequently, on a poll being requested, FRAP 35; 5th Circuit Rule 12, the Government filed a strong brief attacking the Court's decision. Likewise, the private plaintiff's counsel filed a persuasive brief. This merely emphasizes that it has been members of this Court, not the parties, who have raised questions about the Court's decision. This is in keeping with 28 USCA §46 and FRAP 35.

[2] These include the following and those cited therein:
Jenkins v. United States Gas Corp., 5 Cir., 1968, 400 F.2d 28; Oatis v. Crown Zellerbach Corp., 5 Cir., 1968, 398 F.2d 496; Pettway v. American Cast Iron Pipe Co., 5 Cir., 1969, 411 F.2d 998; Local 189, United Papermakers and Paperworkers, 5 Cir., 1969, —— F.2d —— [No. 25956, July 28, 1969];

so because, except for preliminary administrative efforts at conciliation and the rare pattern or practice suit by the United States,[2] effectuation of Congressional policies is largely committed to the hands of individual workers who take on the mantle of a private attorney general[4] to vindicate, not individual, but public rights.

This makes our role crucial. Within the proper limits of the case-and-controversy approach we should lay down standards not only for Trial Courts, but hopefully also for the guidance of administrative agents in the field, as well as employers, employees, and their representatives.

The full Court should look at the issue here posed. And now in the light of the standard erected—sex if coupled with another factor is acceptable—it is imperative that the full Court look at it.

II.

Equally important, the full Court should look to correct what, in my view, is a palpably wrong standard.

The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may.[5]

United States v. Hayes Internat'l. Corp., 5 Cir., 1969, —— F.2d —— [No. 26809, August 19, 1969]; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir., 1969, 408 F.2d 228; Dent v. St. Louis-S.F. Ry., 5 Cir., 1969, 406 F.2d 399.

Also pending before a panel of this Court are two analogous cases under §17 of the Fair Labor Standards Act, 29 USCA §§201 *et seq.*, involving equality of compensation to women: No. 26960, Schultz v. First Victoria Nat'l. Bank; and No. 26971, Shultz v. American Bank of Commerce.

[2] See §707(a), 42 USCA §2000e-6 (a).

[4] See Pettway v. American Cast Iron Pipe Co., note 2, *supra*, 411 F.2d at 1005; Jenkins v. United Gas Corp., note 2, *supra*, 400 F.2d at 32-33.

[5] The man would qualify even though as widower or divorcee he had sole custody of and responsibility for pre-school children.

The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplyfy the simplest biology, must then be a woman.

It is the fact of the person being a mother—*i.e.* a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man.

How the Court strayed from that simple proposition is not easy to divine. Not a little of the reason appears to be a feeling that the Court in interpreting § 703(a)(1), 42 USCA § 2000e-2(a)(1), prohibiting sex discrimination,[6] is bound to accept the contention of one of the parties, rather than pick and choose, drawing a middle line, or for that matter reaching independently an interpretation sponsored by no one. Thus, after noting that in the Trial Court and here the Employer did not "choose to rely on the 'bona fide occupational qualification' section of the Act,[7] but, instead, defended on the premise that their

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[6] Section 703(a)(1) reads as follows:

"(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 USCA §2000-e2(a)(1).

[7] Section 703 (e) states:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to clas-

established standard of not hiring women with pre-school age children is not per se discrimination on the basis of 'sex'" (*Phillips* v. *Martin Marietta Corp.*, 5 Cir., 1969, 411 F.2d 1, 2-3), the Court virtually acknowledges the patent discrimination based on biology. The Court states: "Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the 'bona fide employment disqualification' provision of the statute." 411 F.2d at 4.

But in what immediately followed the Court then does a remarkable thing. Referring to EEOC (appearing only as *amicus*), it states: "The Commission, however, in its appearance before us has rejected this possible reading[8] of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any

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sify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. * * *"

42 USCA §2000e-2(e).

[8] Such a reading is certainly not rejected by EEOC on this rehearing. The supplemental brief (pp. 9-10) recognizes the employer's right to claim and prove the §703(e) "business necessity" exemption. (See note 7, *supra*).

consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, * * * we have no hesitation in choosing the latter." 411 F.2d at 4.

It is this self-imposed interpretive straightjacket which, I believe, leads the Court to the extremes of "either/or" outright per se violation with no defense or virtual complete immunity from the Act's prohibitions. This it does through its test of "sex plus": "[1] A per se violation of the Act can only be discrimination based solely on one of the categories *i.e.* in the case of sex; women vis-a-vis men. [2] When *another* criterion of employment *is added* to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin." [9] 411 F.2d at 3-4 (Emphasis supplied).

Reducing it to this record the Court characterizes the admitted discrimination in this way. "The discrimination was based on a *two-pronged* qualification, *i.e.*, a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the *coalescence* of these *two elements* that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm." 411 F.2d at 4 (Emphasis supplied).

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[9] By supplemental brief (p. 4, n. 1) EEOC agrees with [1] on "per se" violations.

If "sex plus" stands, the Act is dead.[10] This follows from the Court's repeated declaration[11] that the employer is not forbidden to discriminate as to non-statutory factors. Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence tests, aptitude tests, etc. And it bears repeating that on the Court's reading, one of these would constitute a complete defense to a charge of § 703(a) (1) violation *without* putting on the employer the burden of proving "business justification" under § 703(e) (note 7, *supra*).

In addition to the intrinsic unsoundness of the "sex plus" standard, the legislative history refutes the idea that Congress for even a moment meant to allow "non-business justified" discrimination against women on the ground that they were mothers or mothers of pre-school children. On the contrary, mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude.

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[10] Of course the "plus" could not be one of the other statutory categories of race, religion, national origin, etc.

[11] See, *e.g.*, "As was acknowledged in *Cooper, supra*, 42 USC 2000e-2(a) does not prohibit discrimination on any classification except those named within the Act itself. Therefore, once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." 411 F.2d at 4.

In the first place, working mothers constitute a large class[12] posing much discussed problems of economics and sociology. And with this large class and the known practice of using baby-sitters or child care centers, neither an employer nor a reviewing Court can—absent proof of "business justification" (note 7, *supra*)—assume that a mother of pre-school children will, from parental obligations, be an unreliable, unfit employer.[13]

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[12] Statistics compiled by the Wage and Labor Standards Administration of the United States Department of Labor indicate that working mothers comprise an important and increasing segment of the Nation's labor resources. In the most recent compilation (March 1967), there were 10.6 million working mothers in the labor force with children under 18 years of age. This is an increase of 6 million over 1950 and an increase of 9.1 million over 1940. Of the total of working mothers in March 1967, 38.9% were mothers of children under 6 years of age and 20.7% were mothers with children under 3 years of age. In numerical terms, 4.1 million working mothers had children under 6 and 2.1 million working mothers had children under 3. *Who are the Working Mothers,* United States Department of Labor, Wage and Labor Standards Administration, p. 2-3 (Leaflet 37, 1968).

[13] The brief of EEOC points out:

> "In answering the question: 'What arrangements do working mothers make for child care?', the Department of Labor responded:
>
> 'In February 1965, 47 percent of the children under 6 years of age were looked after in their own homes and thirty percent were cared for in someone else's home, but only 6 percent received group care in day care centers or similar facilities.'
>
> *Who are Working Mothers, supra* [Note 12].

Furthermore, it is the policy of the Administration to encourage unemployed women on public assistance, who have children, to enter the labor market by providing for the establishment of day care centers to enable them to accept offers of employment. On August 8, 1969, President Nixon stated in his address to the Nation on welfare reforms:

> 'As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers

In this and the related legislation on equality of *compensation* for women[14] one of the reasons repeatedly stressed for legislation forbidding sex discrimination was the large proportion of married women and mothers in the working force whose earnings are essential to the economic needs of their families.[15]

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who choose to work. However, these would be day-care centers with a difference. There is no single ideal to which this Administration is more firmly committed than to the enriching of a child's first five years of life, and thus helping lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves." *Text of Nixon's Address to the Nation Outlining His Proposals for Welfare Reform*, N. Y. Times, August 9, 1969, at 10, Col. 6."

Brief for EEOC at 11-12.

[14] Equal Pay Act of 1963, 77 Stat. 56, effective June 11, 1964, 29 USCA §206. See pending cases, note 2 *supra*.

[15] Thus, President Kennedy, in signing the Equal Pay Act, summarized the conditions which necessitated such a law, as follows:

"[T]he average women worker earns only 60 percent of the average wage for men * * * Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children * * * and for the protection of the family unit * * * Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year—many of them much less. I believe they bear the heaviest burden of any group in our nation. * * *" [Remarks of the President at signing the Equal Pay Act on June 10, 1963, XXI Cong. Q. No. 24, p. 979 (June 14, 1963).]

At the Senate Hearings, Secretary of Labor Wirtz pointed out:

Congress could hardly have been so incongruous as to legislate sex equality in employment by a statutory structure enabling the employer to deny employment to those who need the work most through the simple expedient of adding to sex a non-statutory factor.[16]

A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done.

"Women's earnings, in many families, are a substantial factor in meeting living costs. *Married women, for example, accounted for over one-half of the total number of women workers in 1962.* Nearly 900,000 working women had husbands who, for various reasons, were not in the labor force, primarily because they were disabled or retired. The proportion of working wives is materially higher among families in the low-income groups." [1963 Senate Hearings, p. 16]

See also Representatives Green (109 Cong. Rec. 9199):

"There are approximately 25 million working women in the labor force today, and we are simply asking, by this legislation, to look at the facts as they face us in 1963, in instances where there is unequal pay. * * * Women are the heads of 4.6 million families in the United States; one-tenth of all the families in this country. Nearly one million working women have husbands who are not employed, mainly because they are disabled or retired. Nearly 6 million working women are single. The proportion of married women who work is materially higher in the low-income families, and, according to the testimony that was presented to the committee, some 7.5 million women workers supplement the income of male wage earners who make less than $3,000 a year. Women's wages average less than two-thirds of the wages paid men."

[16] Too much emphasis cannot be given to the employer's right to claim and prove the §703(e) "business justification" exemption (see note 7, *supra*). This was not done, but on remand it should be open to the employer here.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1058

IDA PHILLIPS, PETITIONER

v.

MARTIN MARIETTA CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a–11a) is reported at 411 F.2d 1. That court's denial of rehearing and rehearing *en banc*, with three judges dissenting (Pet. App. 12a–21a), is reported at 416 F.2d 1257. The opinion of the district court (Pet App. 1a–3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1969. A timely petition for rehearing was denied on October 13, 1969. The petition for certiorari was filed on January 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, an employer may, in the absence of business necessity, refuse to hire women with pre-school age children while hiring men with such children.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

42 U.S.C. 2000e–2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

(e) Notwithstanding any other provision of this title (1) it shall not be an unlawful employment practice for any employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on sex. Under the Act, Congress has entrusted the United States Equal Employment Opportunity Commission and the At-

torney General with important responsibilities for obtaining compliance with the requirements of Title VII. The court of appeals' restricted interpretation of this important statutory mandate, if permitted to stand, will cause unwarranted hardship to families in which the mother is the only available breadwinner.[1] Moreover, the rationale of the decision below, if applied to the other prohibitions of Title VII against employment discrimination based on race, color, religion or national origin, would comprehensively impede the government's efforts to insure equality of employment opportunities for all residents of the United States.

STATEMENT

Solely because she was a woman with pre-school age children, the petitioner was denied employment as an assembly-trainee by the respondent corporation, which employs men with such children as assembly-trainees (Pet. App. 2a). She complained that this constituted discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.

The district court eliminated the essence of petitioner's complaint by striking the portion alleging discrimination based on the fact that she had pre-school age children, on the ground that Title VII did not prohibit such discrimination. The court then

[1] As principal financial contributor to the Aid to Families with Dependent Children Program administered by the States under the Social Security Act (as well as in its role as tax collector), the United States also has a fiscal interest in the issues involved in this litigation. See *King* v. *Smith*, 392 U.S. 309; *Lewis* v. *Martin*, No. 829, this Term.

granted respondent's motion for summary judgment, based on an uncontroverted showing that a larger percentage of the women, as compared with the men, who applied for the job of assembly-trainee were hired.

The court of appeals affirmed, stating (Pet. App. 9a–10a):

> * * * The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired.

A petition for rehearing was denied, with three judges dissenting from the denial of rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The decision below directly affects a substantial number of women in the labor market [2] and condones discrimination against them in contravention of the federal policy of encouraging unemployed women with pre-school age children to seek gainful employment as an alternative to welfare payments.[3]

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[2] In March 1967, there were 10.6 million working women with children under 18 years of age. Of this number, 38.9 percent, or 4.1 million, were mothers with children under 6 years of age. "Who Are The Working Mothers?" U.S. Dept. of Labor, Wage and Hour Adm. (Leaflet 37, 1968).

[3] See, *e.g.*, President Nixon's Address to the Nation on Domestic

Moreover, application of the reasoning of the court of appeals to the Title VII prohibitions against employment discrimination based on race, color, religion, or national origin would have a severely limiting effect. For example, a practice of refusing to hire Negroes with pre-school children while hiring whites with such children would apparently come within the rationale of the decision below that:

> [w]hen another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin [411 F.2d at 3–4].

Nothing in the record of the present case indicates that the respondent's policy of excluding women with pre-school age children from employment was based on any legitimate business interest related to the ability of such women to perform the work, or to the safety or efficiency of the respondent's business operations. Specifically, there was no showing that such

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Programs, Weekly Compilation of Presidential Documents, Vol. 5, No. 32, August 11, 1969, p. 1108:

> As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However, these would be day-care centers with a difference. There is no single idea to which this administration is more firmly committed than to the enriching of a child's first 5 years of life, and thus helping lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves.

women had a higher than average absentee rate, that they could not work necessary overtime, or that they had any other attribute which limited their utility to the respondent. Much less was there a showing that *all* women with pre-school age children were unable to perform adequately.

The courts below, therefore, did not rely on any overriding "business necessity,"[4] nor on the statutory exception for a "bona fide occupational qualification,"[5] in holding that the respondent's policy did not violate Title VII. Instead, the court of appeals' holding is explicitly based on a construction of the statute which condones discrimination based on sex so long as there is an additional, apparently neutral, reason for the otherwise unlawful employment practice.

This holding contravenes the plain language of Section 703, which makes it an "unlawful employment practice for an employer * * * to discriminate against any individual with respect to his * * * terms [or] conditions * * * of employment, because of such individual's race, color, religion, sex, or national origin * * *." To require of prospective women em-

[4] See *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (C.A. 5).

[5] Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1), *supra*, p. 2.

ployees that they not have pre-school age children, while not requiring the same of men, is to discriminate against women on the basis of their sex in the "terms" or "conditions" under which they will be employed. The fact that some women, even if the number is substantial, have met this "term" or "condition" does not eliminate the disparate treatment received by those women who do not meet this qualification which is not required of men.

Where, as here, a qualification is imposed solely on applicants of one sex, it violates the statute unless the employer can justify such discrimination as a "bona fide occupational qualification" or business necessity." This is the essence of the congressional mandate. In departing from that mandate, the decision below has denied the statute's protection to a category of employment applicants who are among those most in need of that protection.

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[6] See, generally, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7); *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228 (C.A. 5); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Calif.); cf. *Lane v. Wilson*, 307 U.S. 268; *Louisiana v. United States*, 380 U.S. 145; *Gaston County v. United States*, 395 U.S. 285; *United States v. Sheetmetal Workers*, 416 F.2d 123 (C.A. 8). And see the Equal Employment Opportunity Commission's regulations implementing Title VII at 29 C.F.R. 1604.1-1604.3. See, also, cases cited in n. 4, *supra*.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

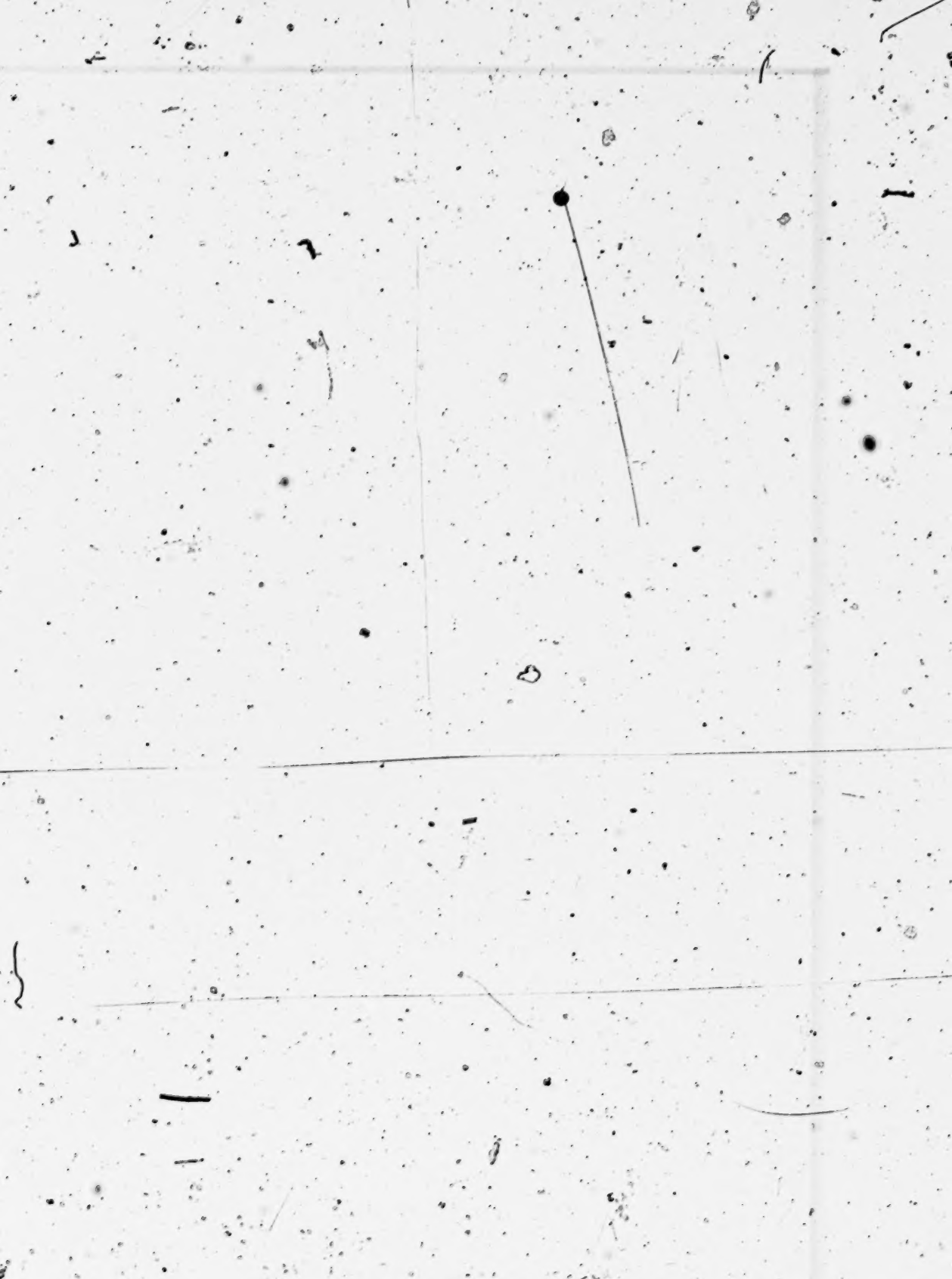
JERRIS LEONARD,
Assistant Attorney General.

LAWRENCE G. WALLACE,
Assistant to the Solicitor General.

ROBERT T. MOORE,
Attorney.

STANLEY P. HEBERT,
General Counsel,
Equal Employment
Opportunity Commission.

FEBRUARY 1970.



SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION

Respondent

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM Y. AKERMAN [redacted]
Suite 506 First National Bank Building
P. O. Box 231
Orlando, Florida 32802
Attorney for Respondent

CLARK C. VOGEL
277 Park Avenue
New York, New York 10017
Of Counsel

J. THOMAS CARDWELL
DONALD T. SENTERFITT
GEORGE T. EIDSON
On the Brief

INDEX

	PAGE
Question Presented	1
Statement of the Case	2
Introduction	3
Argument	
I. The Decision Below Does Not Conflict with Decisions of Other Courts of Appeals	4
II. The Decision Below Does Not Frustrate the Aims or the Effectiveness of Title VII	7
Conclusion	10

AUTHORITIES CITED

	PAGE
Cases:	
Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969)	4, 5
Cooper v. Delta Airlines, Inc. 274 F. Supp. 781 (E. D. La. 1967), *Appeal dismissed*, No. 25,698 (5th Cir., Sept. 1968)	7
Local 53, Heat & Frost Insulators Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969)	5, 6, 7, 9
Papermakers Local 189 v. United States 416 F.2d 980 (5th Cir. 1969)	5, 6
United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969)	5, 6, 8
Statutes:	
42 U.S.C. § 2000e-2(a)	1, 2
Miscellaneous:	
U. S. Department of Labor, Bull. No. 290, 1965 *Handbook on Women Workers* (1965)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Question Presented

Whether the refusal to hire women with pre-school aged children is per se a violation of the sex discrimination prohibition of 42 United States Code § 2000e-2(a).

Statement Of The Case

Petitioner, Ida Phillips, applied for the position of Assembly Trainee with the respondent, Martin Marietta Corporation. Upon being informed that women having pre-school age children would not be considered for this position, she filed the action below complaining that this employment practice constituted unlawful sex discrimination under 42 United States Code 2000e-2(a).

The District Court struck the reference to pre-school age children from the complaint but permitted it to stand otherwise in order to afford the petitioner an opportunity to present any factual evidence of discrimination on the part of the respondent. Martin Marietta Corporation then filed a motion for summary judgment accompanied by supporting affidavits containing evidence to the effect no discrimination in employment opportunities for women had occurred. The petitioner at no time presented any evidence; however, the District Court did assume for the purpose of the motion that men with pre-school age children would have been hired. Contrary to the petitioner's statement of the case, there was no evidence that Mrs. Phillips had a high school background or that this was the only pre-requisite to the job, nor is there anything in this record concerning the employment practices of the respondent in regard to inquiry or requirements as to the family situation of prospective employees. Based on the evidence offered by the respondent and in view of the absence of evidence by the petitioner, the District Court ruled that there was no material issue of fact and granted a summary judgment in favor of Martin Marietta Corporation. This was appealed to the Fifth Circuit Court of Appeals, which resulted in the opinion of which review is now being sought.

Introduction

The petition seeking review relies on two grounds, first, that the decision below conflicts with decisions of other courts of appeals and second, that it is an erroneous construction of important federal legislation which inhibits its effectiveness. To decide whether there is a conflict or construction detrimental to the effectiveness of the Act, we must at the outset note with some precision what was decided. The issue presented to the Court of Appeals was whether it was per se a violation of Title VII to decline to hire women with pre-school age children. Respondent took the position that in declining to hire Mrs. Phillips, it did so on the basis of a qualification concededly not proscribed by the Act, pre-school age children, and not because she was a woman. Whether the application of this non-prohibited standard results in discrimination against women would be resolved as a factual matter. Petitioner maintained that the acts alleged constituted a per se violation of Title VII, and therefore there need be no factual inquiry into the actual effects of the practice.

In its decision, the Court of Appeals decided only that the application of the non-prohibited criterion (pre-school age children) to one sex did not in itself automatically violate Title VII. As the court put it,

> "When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion or national origin. It becomes the function of the courts to study the conditioning of employment on one of the elements outlined in the statute coupled with the additional requirement, and to determine if any individual or group is being denied work due to his race, color, religion, sex or national origin."

In the instant case, both the District Court and the Court of Appeals were persuaded that the evidence showed Martin

Marietta did not in fact discriminate against women generally and there was no evidence whatever that Mrs. Phillips was individually singled out because of her sex.[1]

I.

The Decision Below Does Not Conflict With Decisions of Other Courts of Appeals

There is no real question but that this case does not present a direct conflict with any decision of another court of appeals. As the opinion below says, "none of the cases reviewed by this Court deal with the specific issue presented here" and no case since then has, to counsel's knowledge, done so. Petitioner tacitly concedes this with the statement that the decision conflicts "in principle" with other court of appeals decisions.

Although not clearly specifying the cases on which it relies for conflict, Petitioner seems to suggest that the decision below is inconsistent with *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). See p. 6 of the Petition. A fair review of this case will show that it in no way presents the issue involved in the instant case. *Bowe* involved the bona fide occupational qualification portion of the Act. The specific question was whether an employer's blanket exclusion of women from jobs which entailed lifting 35 pounds or more was a legitimate bona fide occupational qualification.

In the present case, the bona fide occupational qualification exception is in no way involved. The District Court struck the allegations of the complaint relating to pre-school age children prior to the time Martin Marietta was required to

[1] According to the uncontroverted affidavit filed by Martin Marietta, 70% to 75% of the applicants for the position sought by Mrs. Phillips were women and 75% to 80% of those hired for the job were women. These figures represent, as is the fact, that Martin Marietta is in no wise averse to employing women. Mrs. Phillips offered no evidence on her own behalf.

file its answer; however, he permitted other allegations of the complaint to stand to provide the plaintiff the opportunity to present evidence of any actual discrimination. When the plaintiff failed to produce any such evidence, a summary judgment on behalf of the defendant was granted. After reference to pre-school age children was stricken from the complaint there was neither reason nor relevance for Martin Marietta to raise the bona fide occupational qualification defense to justify the practice.[2] That the bona fide occupational qualification provisions of the Act were not an issue considered by the Court of Appeal below was recognized in the opinion:

> "The Defendants do not choose to rely on the 'bona fide occupational qualification' section of the Act, but, instead, defend on the premise that their established standard of not hiring women with pre-school age children is not per se discrimination on the basis of 'sex'."

Bowe, then, turned on a separate and distinct provision of the Act, one expressly not involved in this case.

Petitioner also appears to suggest there may be some conflict between the present case and *Local 53, Heat & Frost Insulators Workers* v. *Volger*, 407 F.2d 1047 (5th Cir. 1969); *Papermakers Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969); and *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969). It should initially be noted each of these cases concerns racial, not sex discrimination, and the first two arise in the Fifth Circuit, therefore not appropriately representing a conflict between circuits.

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[2] In the event the employment criterion here involved is determined to be discriminatory, Martin Marietta would then raise the bona fide occupational qualification defense, and seek to support it with the appropriate evidentiary showing. But before the bona fide occupational qualification becomes an issue, it must first be determined that there is discrimination within the meaning of the Act, which the defendant has denied throughout these proceedings. Only then would the bona fide occupational qualification "excuse" become relevant.

More importantly, a fair reading shows none of these cases involved the same point, "in principle" or otherwise, as the decision below. *Local 53, Heat & Frost Insulators Workers, supra*, began with the concession that the union's acts and policies were discriminatory, and the opinion involved a determination of whether the injunctive relief granted by the district court was proper. In the decision below, the court was dealing with the threshold question of the existence vel non of discrimination. To the same effect is *Papermakers Local 189* where the problem was not whether there was discrimination, but to fix what steps would be necessary to correct the effects of a separate and discriminatory seniority system which had existed prior to the Act.

In the case which did not arise in the Fifth Circuit, *United States* v. *Sheet Metal Workers, Local 36*, the Court of Appeals, reversing the District Court, made a determination that the Act had been violated after an extremely thorough analysis of the evidence which had been produced, and then established in detail the relief to be granted. What happened in *Sheet Metal Workers* is consistent with what the court below held: that the determination of whether the complained of practices of the defendant are discriminatory is to be made by looking at the results of their use.

The question presented below, whether the refusal to employ women with pre-school age children constitutes a per se violation of the Act irrespective of the consequences it produces, has not been faced by any other court.[3] Since the cases cited by the Petitioner as in conflict each present different issues than were before the court below, and since two arise in the same circuit, there is not conflict, even "in principle."

Respondent respectfully suggests that Petitioner's attack on the decision of the District Court below is not appropriate. The District Court's expression of its feeling as to the differences between women and men with pre-school age children contained in the unreported ruling on the motion for summary judgment, however realistic it may be, was not the rationale of the Court of Appeal's decision below. The opinion below

did not concern itself with any generalizations about the sexes, but decided merely that the criterion applied did not per se violate Title VII. It is review of that opinion that is presently being sought, not the order of the District Court.

II.

The Decision Below Does Not Frustrate the Aims or the Effectiveness of Title VII.

In view of the absence of any real conflict, it is apparent that the primary ground upon which review is sought is the conjectural deleterious effects which Petitioner undertakes to hypothesize as a result of this decision. While Chief Judge Brown's statement "If 'sex plus' stands, the Act is dead" has a certain forensic ring, it is not a true characterization.

The opinion below held only that where a non-prohibited employment criterion is applied to sex, it is not discrimination based on sex alone. Whether by the application of such criterion there has been a discrimination based on sex must be determined by a factual inquiry of the effects of the complained of employment practice. This, of course, is precisely what the courts require in almost every case arising under Title VII, and is what Mrs. Phillips declined to do. In most of the Title VII cases, the complained of practice is unquestionably neutral on its face, but the court after examining its effect determines whether it actually produces a discriminatory result. For example, in *Local 53, Heat & Frost Insulators Workers* v. *Volger, supra*, at 1054, the court determined that the requirement of recommendation by present members of union and favorable vote by majority (neutrally applied to

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[3] Most directly bearing on the present question is *Cooper* v. *Delta Airlines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967), *appeal dismissed*, No. 25,698 (5th Cir., Sept. 1968), where the court held Delta's termination of its women stewardesses on marriage was based on marriage, not sex, and, therefore, did not violate the Act.

black and white applicants alike) was in fact used in that case in a discriminatory manner.

Again, in *United States* v. *Sheet Metal Workers*, *supra*, the bulk of the court's extensive opinion deals with a factual analysis of whether the practices of the union constituted discriminatory procedures under the Act.

The opinion below does not hinder the effectiveness of the Act because there is no more burden placed on the plaintiff by virtue of this decision than exists in the practice presently followed under Title VII cases. The Court in the cases cited makes a determination, based on evidence duly presented, as to whether the effect of the defendants practices is to work a prohibited discrimination. Thus, in the present case, if the use of the pre-school age children employment standard applied to women did in fact work a discrimination, the plaintiff was free to produce evidence on the point. The nature of such proof would be the same as in any other cause where it is contended an employer or a union is making use of tests or devices to discriminate. This procedure is consistent with what the Courts have been doing in Title VII cases, in apparently effectively administering the Act.

Petitioner seeks a construction of the Act characterizing the complained of standard as being a per se violation of the Act, and thereby avoiding the necessity of making any showing that women have in fact been deprived of employment opportunity by the practice attacked in the suit. When the courts below declined to make this construction, they simply left the Petitioner in the same position she would have been in had an undisputedly neutral employment practice been challenged. The opinion below does not add any burden to plaintiff's seeking to avail herself of the Act, but only denies her relief where no showing of a discriminatory effect is made.

Petitioner also seeks to raise the specter that this decision will provide a vehicle for the nefarious plans of those lying in wait to discriminate on grounds other than sex, particu-

larly, it is suggested, on racial grounds. We must, of course, note that this decision is confined to the "sex" portion of the Act and whether it will be followed by other circuits or applied to other classifications under the Act is, at this point, an open question. Naturally one could, by conjoining race with some other criterion, work a racial discrimination, but he could also achieve the same result by a standard which applied to all equally, as, for example, the membership approval required in the *Local 53* case. In either case, if the Equal Employment Opportunity Commission and the courts find that racial discrimination is in fact occurring, the appropriate relief may be obtained just as it is now being obtained in the courts.

It is also suggested that because of the high proportion of non-white mothers who work and have children under six, the onus of the decision below will fall along racial lines. For this to be a ground for review, we must presuppose a pattern or practice aimed at excluding women from the work force. To be sure, instances of such discrimination may be pointed out, but there is no evidence in the record presented by this case, nor suggested in the petition, to indicate black women with pre-school age children will be excluded from the work force because of the decision below. As noted previously, if such were the goal of employers, it doubtless would be sought to be achieved by means far more subtle than we are dealing with in the present case and would be dealt with in the same manner as racial discrimination cases are presently being handled. The fact is that many of the black females in the work force are employed as domestic and day workers who are not affected by the legislation in question.[4]

In seeking this court's review, the petition cites statistics to the effect that there are many women with pre-school age children in the labor force, and then asserts this decision will prejudice their work opportunities. There is, however, no nexus, other than counsel's assertion of casual connection, between the premise and the conclusion and therefore is a non-sequitur as far as is reflected by the record or observable facts. No explication of how the harm foreseen will flow

from the decision below is articulated. The appeal to this court's concern with individual rights and liberties is not well founded on anything contained in the record herein.

CONCLUSION

The decision below determined that in those cases in which a pre-employment criterion was used which is not one of the five specifically proscribed by Title VII, the question of whether it is discriminatory is to be decided by factually examining the effect of the use of the standard. This decision is correct, and it is not in conflict with any other decision of a court of appeal. The objectives of Title VII are in no way impaired, since the case requires exactly the same showing that is made in cases where an admittedly neutral qualification is claimed to be discriminatory. Because there is no conflict and because this interpretation of the federal statute will not frustrate the administration of the Act, respondent respectfully suggests that the Writ of Certiorari should not be granted.

Respectfully submitted

WILLIAM Y. AKERMAN
Attorney for Respondent

[1] In 1964, 29.9% of the non-white female workers were engaged as private-household workers. This was the largest single category. U.S. Dept. of Labor, *1965 Handbook on Women Workers*, Bull. 290 at 103.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to a Petition for a Writ of Certiorari has been furnished by mail this day of February 1970 to the following: Jack Greenberg; James M. Nabrit, III; Norman C. Amaker; William L. Robinson; Lowell Johnston; Vilma Martinez Singer, 10 Columbus Circle, New York, New York 10019; Earl M. Johnson, 625 West Union Street, Jacksonville, Florida 32202; and George Cooper, 435 West 116th Street, New York, New York.

WILLIAM Y. AKERMAN

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 73

IDA PHILLIPS,
Petitioner,

v.

MARTIN MARIETTA CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR NATIONAL ORGANIZATION FOR WOMEN

JACOB D. HYMAN,
77 West Eagle St.,
Buffalo, N. Y. 14202,

KENNETH M. DAVIDSON,
AL KATZ,
77 West Eagle St.,
Buffalo, N. Y. 14202,

Attorneys for Amicus Curiae.

FAITH A. SEIDENBERG,
1404 State Tower Bldg.,
Syracuse, N. Y. 13202,
Of Counsel.

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INDEX.

	PAGE
Motion and Interest of Amicus	1
Statement of Case	4
Argument	5
I. The impact of the decision below on the right of women to be free from discrimination in employment indicates Congress did not intend the result reached by the courts below.	5
a. The result is inconsistent with the overall federal policy of enabling women to work.	5
b. The number of women who may be adversely affected by the decision below indicates its inconsistency with Congressional intent	8
II. The decision below is inconsistent with the language of the statute and the interpretation of it by the courts to the extent it requires discrimination be directed against an entire class to constitute a violation of § 703(a)	10
III. The order on remand should require Respondent to justify its employment practice under § 703(e).	13
Conclusion	14

Table of Cases.

Allen Bradley Co. v. Local Union No. 3, I. B. E. W., 325 U. S. 797 (1945) 6

Bing v. Roadway Express, Inc., 60 CCH Labor Cases 9232 (D. C. Ga.) (1968) 12

Cooper v. Delta Airlines, Inc., 274 F. Supp. 781 (1967) 9, 10

Phillips v. Martin Marietta Corporation, 411 F. 2d 1 (1969) 4, 5, 6, 9, 10

Phillips v. Martin Marietta Corporation, 416 F. 2d 1257 (1969) 3, 4

Quarles v. Philip Morris, 279 F. Supp. 505 (1968) 12

PAGE

United States v. Local 189, United Papermakers and Paperworkers, 282 F. Supp. 39 (1968) 12
Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474 (1951) 6
Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (1969) 5, 14

STATUTES.

5 U. S. C. § 7151 6
42 U. S. C. § 630 7
42 U. S. C. § 2000e-2(a) 4, 11, 12, 13
42 U. S. C. § 2000e-2(e) 5, 13, 14
42 U. S. C. § 2711 7
42 U. S. C. § 2728 7
77 Stat. 56 6

REGULATIONS.

29 C. F. R. 1604.1(2) 13
(Proposed) 60 C. F. R. 60-20.3(b) 7
33 Fed. Reg. 10026 7

MISCELLANEOUS.

1969 HANDBOOK ON WOMEN WORKERS, U. S. Department of Labor, Women's Bureau Bulletin 294 ..... 2, 3, 8, 9
Federal Fund for Day Care Projects, Women's Bureau, U. S. Department of Labor (1969) 7

IN THE

Supreme Court of the United States

October Term, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

v.

MARTIN MARIETTA CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR NATIONAL ORGANIZATION FOR WOMEN

Having been denied consent to file a brief amicus curiae by the Martin Marietta Corporation, the National Organization for Women respectfully prays that the Supreme Court of the United States grant it leave to file a brief amicus curiae in the case of Ida Phillips v. Martin Marietta Corporation now before the court.

Motion for Leave to File a Brief Amicus Curiae and Interest of Amicus

The National Organization for Women (NOW) was founded in 1966 by women and men concerned by the personal and national losses resulting from discrimination against women. The purpose of the organization is "to

take action to bring women into full participation in the mainstream of American society, *now*, exercising all the privileges and responsibilities thereof in truly equal partnership with men. This purpose includes, but is not limited to, equal rights and responsibilities in all aspects of citizenship, public service, employment, education and family life and it includes freedom from discrimination because of marital status or motherhood." (§ 2 of Chapter by-laws of National Organization for Women.)

In an effort to implement its goals the National Organization for Women has taken stands on and worked for the passage of an equal rights for women amendment to the United States Constitution, abolition of laws penalizing abortion, revision of state protective laws for women, and amendments to the Civil Rights Act of 1964 which would grant the Equal Employment Opportunity Commission the power to issue cease and desist orders.

In pursuing these goals NOW has solicited a broad membership guaranteeing the right to join regardless of race, color, sex, religion, national origin, age or economic status. The organization has over 50 chapters in more than 24 states and a paid membership in excess of 3000.

The need for an organization to promote and protect the rights of women, and in particular working women, is clear. The 1969 HANDBOOK ON WOMEN WORKERS (hereinafter HANDBOOK) published by the Women's Bureau of the United States Department of Labor, reports that while sixty-five percent of the growth of the national labor force since 1940 has been due to the increase in number of women workers (HANDBOOK, p. 5), the incomes of women working full time is not only less than two-thirds of that earned by men working full time, but also the gap between men

1956 and 1966 (HANDBOOK pp. 133-4). Despite the passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, the trend in favor of discrimination does not appear to be abating.

In this context the case of *Ida Phillips v. Martin Marietta Corporation* now before the court is of immense importance. As stated by Chief Judge Brown in his dissent from denial of rehearing and petitioner in his brief, if the decision of the United States Court of Appeals for the Fifth Circuit is upheld, "the Act is dead," (416 F. 2d 1257, 1260 (1969)) at least for women, and with it the rights of women will have been severely curtailed.

In their briefs requesting writ of certiorari petitioner and the United States have expressed overriding concern for the preservation of the entirety of Title VII. They understand that the decision below would undermine the efficiency of Title VII with regard to racial, religious and national origin, as well as sexual discrimination. For this reason neither petitioner nor the United States has devoted its full attention to the issue of sex discrimination. Neither has, for example, explored the effects of the decision below on other governmental projects, such as day care centers and work incentive programs, which are designed to assist and encourage mothers with preschool children to seek and maintain employment.

NOW, representing a more narrow institutional interest than either petitioner or the United States, is primarily concerned with women's freedom from sex discrimination. The direct importance of the case to the 14.4 million mothers with preschool children and the implications for all American women require the fullest possible consideration of the issues. NOW, as an organization dedicated to

the equality of women, therefore requests leave to file a brief amicus curiae in the case of *Ida Phillips v. Martin Marietta Corporation.*

Respectfully submitted,

JACOB D. HYMAN,
KENNETH M. DAVIDSON,
AL KATZ,
77 West Eagle St.,
Buffalo, N. Y. 14202,
Attorneys for Amicus Curiae.

FAITH A. SEIDENBERG,
1404 State Tower Bldg.,
Syracuse, N. Y. 13202,
Of Counsel.

Statement of Case

The question before the Court is whether an employer may escape the prohibitions against discriminating on the basis of sex contained in Title VII of the Civil Rights Act of 1964 when it refuses to hire women with preschool children while at the same time it hires men with preschool children.

The pertinent provision of the Act states: "It shall be an unlawful employment practice for an employer . . . to . . . refuse to hire . . . any individual . . . because of such individual's . . . sex." (§703(a) of Civil Rights Act of 1964, (42 U. S. C. 2000(e)-2(a)).

In reviewing petitioner's claim, the Court of Appeals below stated:

> "The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta" (411 F. 2d 1 at 4 (1969)).

The Court concluded that the hiring practices of Martin Marietta were permissible because they only discriminated against a sub-class of women, "*i.e.*, a woman with preschool age children" (411 F. 2d 1 at 4 (1969)). The effect of these two statements is that a prima facie violation of the Act cannot be established unless an employer denies employment to *all* women.

Thus the initial issue before the court is *not* whether the respondent has violated the Act (although there may be sufficient facts to make such a determination) *nor* is the issue whether the Act envisions circumstances in which men and women may be lawfully treated differently. Rather, *the initial issue before the court is whether a prima facie case of discrimination exists against the employer when he imposes conditions to the hiring of persons of one sex that are not applied to persons of the other sex.* Once the complainant has established a prima facie case of discrimination, the burden then shifts to the employer to show that "sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." § 703(e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(e). *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 at 232 (1969).

ARGUMENT

I. The impact of the decision below on the right of women to be free from discrimination in employment indicates Congress did not intend the result reached by the courts below.

a) The result is inconsistent with the overall federal policy of enabling women to work.

As the Court below recognized, "it is well established administrative law that the construction put on a statute

by an agency charged with administering it is entitled to deference by the courts . . ." (411 F. 2d 1, 3 (1969)). It is also well recognized that in construing the provisions of an act the courts should look to the provisions and interpretations of related acts, (*Universal Camera v. NLRB*, 340 U. S. 474 (1951)) and should take into account the impact of its interpretation upon related acts. *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

The sex discrimination provisions of the Civil Rights Act of 1964 are only a part of the federal statutory scheme designed to prohibit discrimination against women in employment and promote growth and stability in the national labor force. In the Equal Pay Act of 1963 the Congress specifically declared that "wage differentials based on sex . . . depress wages and living standards . . . prevent the maximum utilization of . . . labor resources . . . burden commerce . . . and constitutes an unfair method of competition." 77 Stat. 56 (1963). After the passage of the Civil Rights Act of 1964 the Congress reaffirmed that "[i]t is the policy of the United States to insure equal employment opportunity for employees without discrimination because of . . . sex . . ." 5 U. S. C. § 7151 (1966) and directed the President to use his powers to implement the policy. By executive order the President charged the Secretary of Labor with the responsibility of ensuring that contractors with the United States take affirmative action so that they will not discriminate on the basis of sex (Executive Order 11375) and the Civil Service Commission with the responsibility of ensuring equal opportunity for women in federal employment (Executive Order 11478).

Beyond the affirmative action involved within the scope of the executive orders the Congress has specifically re-

quired that vocational training programs such as the Job Corps be open to female applicants (42 U. S. C. § 2711) and reinforced its determination in the case of the Job Corps by amending the statute to mandate a minimum percentage of females in the program (42 U. S. C. § 2728 (b)). The regulations issued under Work Incentive Program (42 U. S. C. § 630 *et seq.* (1967)), provide vocational training for mothers who are receiving or might in the future receive public assistance, *and* provide day care centers for their *preschool children* (33 Fed. Reg. 10026 (1968)). The federal government sponsors at least fourteen other programs which help finance child care centers as well as five programs to train day care personnel and four programs for experimentation designed to improve child care.[1]

National policy to ensure equal employment opportunity for all women, including mothers with preschool children, has been reflected in decisions concerning the interpretation of sex discrimination prohibitions. It is not only the EEOC which has determined that refusal to hire women with preschool children is discrimination based on sex. The Labor Department has issued proposed regulations on the same question:

> "An employer should not deny employment to women with children . . . unless it has similar exclusionary policies for men . . ." (60 C. F. R. 60-20.3(b)).

This determination should also be given deference in determining what constitutes discrimination against women.

Equally important are the effects of the decision below upon the affirmative Acts which are designed to train women workers and facilitate their employment. It is against

[1] See, *Federal Funds for Day Care Projects*, Women's Bureau, U. S. Department of Labor

common sense to suppose that Congress would guarantee equal employment opportunity to women, provide for training of women workers, provide support for day care centers, yet intend to allow employment discrimination against women with preschool children.

b) The number of women who may be adversely affected by the decision below indicates its inconsistency with Congressional intent.

In 1968, 29,204,000 women were in the labor force and constituted over 37% of the labor force in the United States. HANDBOOK p. 9. The following table outlines selected personal characteristics of women who were in the labor force in 1967.

Selected Characteristics of Women in the Labor Force[2]

Characteristic	Number in millions (000,000)	Percent of total women in labor force
Total Women in Labor Force	27.5	100.0%
Single	5.9	21.5
Married	17.5	63.5
Husband present	15.9	57.8
Husband absent	1.5	5.7
Widowed	2.5	7.0
Divorced	1.6	6.0
Mothers in the labor force		
with children under 18	9.7	35.2
with children under 6	3.7	13.4

Child Care Arrangement of Working Mothers with Children under 6 by percent[3]

Care in child's own home		47%
by father	14.4%	
by others	32.6%	
Care outside child's home		53%

[2] Source, HANDBOOK pp. 23 and 48 (Tables 7 and 21). Totals may not add exactly due to rounding.

[3] Source, HANDBOOK p. 49 (Table 22).

The decision below would permit any employer to refuse to hire any of the 3.7 million mothers with children under six who are currently in the labor force as well as the additional 10.7 million mothers with children under six potentially in the labor force.[4] The decision takes note of "the differences between the normal relationships between working fathers and working mothers to their preschool age children . . ." (411 F. 2d 1 at 4 (1969)) but does not require the employer to justify his employment practice either in terms of the needs of the business or in terms of the disability of the applicant. The rule does not take into account that over 10% of working women are heads of families (HANDBOOK p. 128, Table 56). Nor does the decision take into account that in families where mothers work, almost 15% of their husbands care for the children while the mothers work (see chart above). The decision below simply says that Title VII of the Civil Rights Act of 1964 affords no protection to women with preschool children.

In support of its position that mothers with preschool children fall outside the Act, Respondent in its brief in opposition to the writ of certiorari cites the case of *Cooper v. Delta Airlines, Inc.*, 274 F. Supp. 781 (1967), for the proposition that women who are married may be refused employment on the basis of their marital status without violating the Act. While the 5th Circuit below characterized that case as one which permitted employers to refuse to hire all married persons, Respondent's reliance upon it indicates the inevitable implications of the decision below. If an employer need not explain or justify why women with preschool children are refused employment, if the employer need only link femininity with some other characteristic to avoid the Act, then employers who refuse to hire women who are married must also be outside the

[4] Interpolation from HANDBOOK p. 39 (Table 16).

scope of the Act. Unlike the determination in *Cooper v. Delta Airlines, Inc., supra*, there is no requirement that the rule apply without regard to sex.

The effect of removing the protection of the Act from married women would be to deny equal employment opportunity to over 63% of the women in the labor force (see chart above). Over seventeen million Americans currently in the labor force would then be subject to discrimination on the basis of a characteristic—being women—which they are born into, but which bears no relation to their ability to perform the work desired by the employer.

Under the reasoning of the court below any of the selected characteristics listed in the chart above could be used to avoid the prohibition on sex discrimination of the Civil Rights Act of 1964. The Court of Appeals decision allows an employer to discriminate so long as he hires some class of women without regard even to the size of that class. It is not reasonable that the Congress would have passed an act with such limited effect. There is no evidence that this was their intention and such futility should never be presumed.

II. The decision below is inconsistent with the language of the statute and the interpretation of it by the courts to the extent it requires discrimination be directed against an entire class to constitute a violation of § 703(a).

The Court of Appeals below stated:

> "When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin" (411 F. 2d 1 at 3-4 (1969)).

This means that the employment practice must apply to the entire class, all women, before a violation of § 703(a) can be established. Such an interpretation does not make sense as it would allow a company to refuse to hire women who are under sixty-five (no discrimination on the basis of sex) or refuse to hire Italian men who are single (no discrimination on the basis of national origin) or refuse to hire Jews who do not have PhD's in nuclear physics (no discrimination on the basis of religion) or, refuse to hire blacks who are not over six and a half feet tall (no discrimination on the basis of race or color). The fact that such results would strip the statute of practical meaning should have indicated there was a problem in the Fifth Circuit's reading of the statute.

If the statute were to read—employment discrimination against all women shall be unlawful—, then it might be an open question whether the intent of the statute was to prohibit "discriminations only when they apply to all women" or to prohibit "all discriminations against each and every women that was based on her femininity." § 703(a) of the Civil Rights Act of 1964, however, did not frame the statute in that manner. The statute states that it is unlawful to refuse to hire an individual "because of such individual's race, color, religion, sex or national origin." The statute makes unlawfulness turn on the basis by which the employer distinguishes between the person hired and the person refused. If the difference between the person hired and the person refused is the individual's race, color, religion, *sex*, or national origin, then the employment practice is unlawful. In Mrs. Phillips' case, it is obvious that the basis of Martin Marietta's refusal to hire her was her sex. The District Court found Martin Marietta "does employ males with preschool children"

(Petitioner's Appendix p. 23a). Martin Marietta refused to hire Mrs. Phillips because she had preschool children. The corporation's rule distinguishes between applicants who have preschool children on the basis of the individual's sex.

The Court of Appeals "coupling" rationale ignores the terms of the statute. It fails to determine the basis on which the employer distinguishes between similarly situated applicants. Sex-plus hiring practices could only be held lawful if § 703(a) prohibited discrimination solely when it was practiced against an entire class. Such an interpretation is not only inconsistent with the words of the statute, it is also implicitly inconsistent with previous cases.

Because it had never been suggested, before the decision below, that § 703(a) covers only discrimination against entire classes, the courts have never explicitly ruled upon the question. Nevertheless decisions concerning the Act have consistently found violations where less than the entire class was subject to discrimination. For example in *Quarles v. Philip Morris*, 279 F. Supp. 505 (1968), the court found a violation even though the discriminatory seniority system only affected blacks hired prior to passage of the Civil Rights Act of 1964. Cf. *United States v. Local 189 United Papermakers and Paperworkers*, 282 F. Supp. 39 (1968), *Bing v. Roadway Express Inc.*, 60 CCH Labor Cases 9232 (1968) (Not otherwise reported).

These cases were of course more difficult than the case now before the court. The cases dealt with rules that did not apply solely to blacks or even affect all black employees; rather the rules primarily affected some black employees. Unlike the rule which barred Mrs. Phillips,

the rules in those cases were neutral on their face. Only after a factual determination were the rules characterized by the courts as being discriminatory and then only as to some black employees. It was not thought necessary and indeed would have been impossible to show that all black employees suffered from the rule. The only factual inquiry that is necessary is that the employer based his employment practice upon a forbidden criterion—race, color, religion, sex or national origin. Once such determination is made a prima facia case of discrimination is established.

The District Court determined that the Martin Marietta Corporation hired applicants with preschool children except those of the female sex. This determination should have compelled the court to find that the Martin Marietta Corporation had engaged in an employment practice prohibited by § 703(a) and constituted a prima facia violation of Title VII of the Civil Rights Act of 1964.

III. The order on remand should require Respondent to justify its employment practice under § 703(e).

Respondent may feel a determination that it has refused women employment in violation of § 703(a) is unjust because it has a high percentage of women employees. But such a determination does not preclude Respondent from showing that the use of sex as a hiring criterion is justified. § 703(e) of the Act specifically recognizes that an individual's religion, *sex*, or national origin may be an appropriate hiring criterion in certain instances. For example sex is appropriate where the employment involves the portrayal of a member of one sex (29 C. F. R. 1604.1(2)). Respondent has the opportunity to show that its hiring rule is "reasonably necessary to the normal

operation of [its] business . . ." (§ 703(e) of the Civil Rights Act of 1964, 42 U. S. C. § 2,000e-2(e)).

The Court of Appeals for the Fifth Circuit has set out the basic standard by which Respondent's justification of its hiring practice should be judged in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (1969).

> "We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." 408 F. 2d at 235.

Respondent should be required to prove that all or substantially all women with pre-school age children would be unable to perform the duties of the job involved.

Conclusion

For the foregoing reasons it is urged that the Court should reverse the ruling below.

Respectfully submitted,

JACOB D. HYMAN,

KENNETH M. DAVIDSON,
AL KATZ,
77 West Eagle Street,
Buffalo, N. Y. 14202,
Attorneys for Amicus Curiae.

FAITH A. SEIDENBERG,
1404 State Tower Bldg.,

Certificate of Service

I, Jacob D. Hyman, attorney of record for Amicus Curiae, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the day of April, 1970, I served the requisite number of copies of the foregoing Brief upon Jack Greenberg, James M. Nabritt, III, Norman C. Amaker, William L. Robinson, Lowell Johnston, Velma Martinez Singer, 10 Columbus Circle, New York, New York 10019, and Earl M. Johnson, 625 West Union Street, Jacksonville, Florida 32202, Attorneys for Petitioner and William Y. Akerman, Suite 506 First National Bank Building, P. O. Box 231, Orlando, Florida 32802, Attorney for Respondent and Erwin Griswold, Solicitor General, Department of Justice, Washington, D. C. 20025, by depositing the same in the United States mail, air mail postage prepaid, and properly addressed to them at the addresses given.

.....,

JACOB D. HYMAN,
77 West Eagle St.,
Buffalo, N. Y. 14202.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

GEORGE COOPER
CHRISTOPHER CLANCY
401 West 117th Street
New York, New York 10026

Attorneys for Petitioner

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutory Provisions Involved	2
Statement	3
ARGUMENT—	
It Is a Violation of the Sex Discrimination Prohibition in Title VII, Civil Rights Act of 1964, to Refuse to Hire Women With Pre-School Children While Hiring Men of the Same Class	5
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969)	8
Cooper v. Delta Airlines, Inc., 274 F. Supp. 781 (E.D. La. 1967) *appeal dismissed*, No. 25,698 (5th Cir. 1968)	8
Cox v. U.S. Gypsum Co., 284 F. Supp. 74, 78 (N.D. Ind. 1968), *aff'd as modified*, 409 F.2d 289 (7th Cir. 1969)	14

PAGE

Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931) 14
FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) 14, 15
FTC v. Mandel Bros., 359 U.S. 385, 391 (1959) 14

Int'l Chem. Workers v. Planters Mfg. Co., 259 F. Supp. 365, 366-67 (N.D. Miss. 1966) 14

Lansdale v. United Airlines, 62 Lab. Cas. ¶9417 (S.D. Fla. 1969) 11
Local 53, International Association of Heat & Frost Insulators and Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969) 7, 9
Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) 7

Phillips v. Martin Marietta Corporation, 411 F.2d 1 (5th Cir. 1969) 1

Schultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969) 8
Sprogis v. United Airlines, Inc., 62 Lab. Cas. ¶9399 (N.D. Ill. 1970) 8, 9

United States v. American Trucking Assn., 310 U.S. 534, 549 (1940) 14
United States v. Public Utilities Comm., 345 U.S. 295, 314-15 (1953) 14
United States v. Sheet Metal Workers, Local 36, 416 F.2d 135 (8th Cir. 1969) 7, 12
Udall v. Tallman, 380 U.S. 1, 16 (1965) 14

Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) 8, 10

PAGE

Statutes:

28 U.S.C. §1254(1) 1

42 U.S.C. §2000e-2(a)(§703(a)) 2, 3

42 U.S.C. §2000e-2(e)(§703(e)) 2

Miscellaneous:

Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969) 9

Equal Employment Opportunity Commission Sex Discrimination Guidelines, 29 C.F.R. §1604.1(a), §§1604.2, 1604.3 (1968) 10

EEOC Decision, Dodd v. American Airlines, Inc. Case No. 6-6-5762, reported in CCH Employment Practices Guide ¶1210.522 (June 20, 1968) 8

House Rep. No. 570, at H.R. 405, 88th Cong., 1st Sess. (1963) 16

Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review (Sept., 1965) 12

Ross and Hill, eds. Employment, Race and Poverty (1967) 13

U.S. Dept. of Labor, Women's Bureau, Background Facts on Women Workers in the United States (Sept., 1968) 12, 13

U.S. Dept. of Labor, Women's Bureau, Working Mothers and the Need for Child Care Services (June 1968) 12

PAGE

U.S. Dept. of Labor, Women's Bureau, Who Are the Working Mothers? Leaflet 37 (1968) 13

U.S. Dept. of Labor, The Negro Family—The Case For National Action (March 1965) 13

U.S. Dept. of Labor, Bureau of Labor Statistics, Special Labor Forces Report (1964) 14

U.S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings (May, 1963) 14

110 Cong. Rec. 2566 (1964) 16

110 Cong. Rec. 7213 (1964) 10

IN THE

Supreme Court of the United States

October Term, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Citations to Opinions Below

The opinion of the District Court, not yet reported, is reprinted at pp. 22a-23a of the Appendix. The opinion of the U.S. Court of Appeals for the Fifth Circuit, reprinted in the Appendix at pp. 30a-38a, is reported at 411 F. 2d 1. The denial of rehearing and accompanying dissent of Chief Judge Brown and Judges Ainsworth and Simpson is reported at 416 F.2d 1257 (5th Cir. 1969), and is reprinted in the Appendix at pp. 42a-52a.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered May 26, 1969. A timely request for rehearing, initiated by a member of the Court, was denied October 13, 1969, and this petition for certiorari was filed January 10, 1970 and granted March 2, 1970 (A. 55a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the sex discrimination prohibition of §703, Civil Rights Act of 1964, is violated by refusal to hire any women with pre-school children while hiring men of the same class, where the distinction does not purport to be based on a bona fide occupational qualification.

Statutory Provisions Involved

United States Code, Title 42

§2000e-2(a) [§703(a) of Civil Rights Act of 1964]

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§2000e-2(e) [§703(e) of Civil Rights Act of 1964]

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Statement

On September 6, 1966 the petitioner, a woman with preschool age children, applied for a job as Assembly Trainee with the Martin Marietta Corporation, the respondent (hereinafter sometimes "the company") (A. 3a). Petitioner had a high school background, the only specified prerequisite for the job, but was told by respondent that applica-

tions from women with pre-school age children were not being considered (A. 4a, 16a, 17a).

On December 12, 1967, after properly proceeding through the EEOC, the petitioner filed suit claiming that respondent's actions constituted unlawful sex discrimination under the Civil Rights Act of 1964 (A. 6a). The Company's policy of refusing to consider applications from women with pre-school children is apparently not applied to men in the same category. Pursuant to petitioner's request for admission, the company admitted that it hires men with pre-school age children as Assembly Trainees (A. 21a-23a). The District Court struck the allegations in petitioner's complaint regarding the pre-school children rule, as "irrelevant and immaterial" and ruled for the company on summary judgment when she could introduce no other evidence of sex discrimination (A. 14a-15a, 22a-23a). The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on May 26, 1969, holding that this discrimination "based on a two-pronged qualification, i.e., a woman with pre-school age children" was not discrimination because of sex within the meaning of the Act (A. 30a-38a). A timely request for rehearing initiated by a member of the Court, was denied October 13, 1969, Chief Judge Brown and Judges Ainsworth and Simpson dissenting (A. 42a-52a).

ARGUMENT

It Is a Violation of the Sex Discrimination Prohibition in Title VII, Civil Rights Act of 1964, to Refuse to Hire Women with Pre-School Children While Hiring Men of the Same Class.

For reasons stated in greater detail below, the refusal of respondent to employ women with pre-school age children constitutes discrimination based on sex and is proscribed by Title VII of the Civil Rights Act of 1964.

1. The decision below is based upon an erroneous interpretation of Title VII.

Title VII prohibits discrimination in employment based on sex. This is such a case. Title VII declares:

> It shall be an unlawful practice for an employer—to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin.
> 42 U.S.C. §2000e-2(a) [§703(a)]. (Emphasis added.)

Title VII of the Civil Rights Act of 1964 prohibits not only flat refusals to employ women. Where, as here, the respondent hires men with pre-school children for one job and refuses to hire women with pre-school children for the same job, the respondent violates either that portion of Title VII which enjoins him from refusing to hire or that portion which bars him from "otherwise" discriminating because of such individual's sex. Insofar as the court below held that Title VII permitted such differentiation, it erred.

The District Court attempted to justify its decision by stating that:

> The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies (A. 23a).

While it may be argued that certain individual women (or, in equal measure, certain individual men) might have special responsibilities toward young children that are relevant to the satisfactory performance of a job (e.g., where the care of such children prevents a woman from remaining on the job from nine to five), respondent does not pretend to relate its employment specifications to such responsibilities. The company will not hire women with pre-school children if there is a grandmother or older sister at home to care for them, or if a day care center fulfills that purpose. Nor will it hire women with pre-school children even if their husbands are at home unemployed (as often occurs because of lay-off or disability).[1] Respondent will apparently hire widowers with pre-school children, but not widows. It will apparently hire men with pre-school children even if their wives are already employed elsewhere. Respondent's rule makes no attempt to assess the role of family responsibility and its relevancy to employment in any objective way.

The Fifth Circuit, in holding that the respondent did not violate Title VII, took a slightly different tack:

> The discrimination was based on a two-pronged qualification, i.e., a women with pre-school age children. . . . It is the coalescence of these two elements that denied her the position she desired (A. 36a).

However, as Chief Judge Brown points out in his dissent to the denial of the petition for rehearing:

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[1] Studies show that 8% of working women have husbands who cannot work. Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review, Sept. 1965, at 1077.

> The discrimination factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.
>
> *It is the fact of the person being a mother—i.e., a woman—not the age of the children, which denies employment to a woman which is open to a man* (A. 45a). (Emphasis added)

In short, the petitioner, because she is a mother—i.e., a woman—was denied employment. Title VII says this can no longer be done.[2]

Both courts adopted a discriminatory double standard rooted in traditional notions of the woman's usual place at

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[2] The Court of Appeals also relied on data showing that respondent had hired a high percentage of female assembly trainees (75%-80%) as evidence of a lack of discrimination (A. 32a, 36a). This is beside the point, however. No particular percentage of female employees in itself shows a lack of discrimination. Such percentages are useful where a neutral practice (non-sex-related and non-race-related on its face) is being challenged because of its discriminatory impact. See *Local 53, Heat & Frost Insulators Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) (nepotism rule); *Local 189, Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, —— U.S. —— (1970) (seniority rule); and *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969) (work referral rule). The Court of Appeals may have been misled by the approach taken in these neutral practice cases. Where, as here, however, the practice is not neutral, but is discriminatory on its face, statistics prove nothing. There are many reasons why there may be a high percentage of women in a job despite an employer's application of a double standard as to them. The only relevant point is that the percentage of women presumably would and should have been higher had the employer operated under neutral standards rather than under a double standard which screened out a large group of women from eligibility for the job.

home and the man's usual place at work. Respondent's rule is a pure example of the "subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work" [3] and the "romantic paternalism" [4] which Title VII was designed to eliminate.

The unlawfulness of such double standards has been affirmed in numerous lower court decisions. In *Sprogis* v. *United Air Lines*, 62 Lab. Cas. ¶ 9399 (N.D. Ill., Jan. 21, 1970), the employer followed a policy of discharging female stewardesses who got married but not discharging male stewards under the same circumstances. The court held this double standard regarding marriage to violate Title VII.[5] In *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969), and *Weeks* v. *Southern Bell Tel. and Tel.*, 408 F.2d 228 (5th Cir. 1969), the employer refused to hire women for jobs requiring the lifting of moderate weights (35 pounds in *Bowe* and 30 pounds in *Weeks*) while not fixing a similar weight maximum for men. In both cases the courts held this double standard regarding weights to violate Title VII. Indeed, in the weight maximum cases it

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[3] *Shultz* v. *First Victoria National Bank*, 420 F.2d 648 (5th Cir. 1969) (Equal Pay Act case).

[4] *Weeks* v. *Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

[5] *Sprogis* v. *United Air Lines*, discussed in text is to be distinguished from *Cooper* v. *Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967), *appeal dismissed*, No. 25,698 (5th Cir. 1968), which was referred to in the opinion below. *Cooper*, like *Sprogis*, was an attack on the widespread airline policy of discharging stewardesses who get married. But in *Cooper*, unlike *Sprogis*, the airline employed no men in the stewardess category and therefore the policy had no adverse effect on women vis a vis men. Subsequent to the *Cooper* decision, the refusal to hire male stewards was ruled unlawful, thus setting the stage for the successful challenge in *Sprogis*. See *Dodd* v. *American Airlines, Inc.* EEOC Decision, Case No. 6-6-5762, reported in CCH Employment Practices Guide ¶1210.522 (June 20, 1968).

was so clear that a double standard violates Title VII that the employer virtually conceded that the policy constituted sex discrimination, and attempted to justify it under a special exemption in the statute for bona fide occupational qualifications. This exemption, which Respondent has not claimed, is discussed at pp. 10-11, *infra*. The only lower court decision even suggesting that a sex-related double standard may be lawful is *Lansdale* v. *United Air Lines*, 62 Lab. Cas. ¶9417 (S.D. Fla. Dec. 2, 1969), where on the same facts as *Sprogis, supra*, the court held that the discharging of married stewardesses did not constitute sex discrimination. However, the District Court there relied upon and clearly felt controlled by the Court of Appeals decision in this case below. As such it offers no independent authority on this issue.

This does not mean that an employer must ignore family responsibilities of potential employees. To the extent such responsibilities may cause substantial problem in job performance an employer is free to set standards *to protect his bona fide business interests*. But such standards should be related to the problem at hand, not to the sex of the potential employee. Thus an employer may require that any parent with primary child care responsibilities make adequate day care arrangements. This rule would cover some men, e.g., widowers, and it would exempt some women, e.g., those whose husbands remain at home. Such neutral, non-sex-related standards are clearly permitted under Title VII whenever the needs of business require them.[6] Respon-

[6] Even a neutral rule should be supported by evidence of business need to prevent its use as a device to discriminate against women. See *Local 53, Heat & Frost Insulators and Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1600-1601 (1969).

dent, however, has made no attempt to use a neutral standard.

Moreover, Title VII even recognizes that in certain situations sex will be such a dominant factor in job performance that all women or some subgroup of women must per se be excluded. In such situations an employer may establish that sex is

> a bona fide occupational qualification [a BFOQ] reasonably necessary to the normal operation of [his] particular business or enterprise,

and thereby gain the right to impose a sex related hiring standard. However, use of this exemption is strictly limited to prevent it from vitiating the overall Act and it is unlikely that respondent could qualify under it.[7] See 110 Cong. Rec. 7213 (1964); *Weeks* v. *Southern Bell Tel. and Tel.*, 408 F.2d 228 (5th Cir. 1969); Equal Employment Opportunity Sex Discrimination Guidelines, 29 C.F.R. §1604.1(a) (1968).

The company has not even claimed that its policy rises to the level of a BFOQ. The company has not offered the slightest evidence of any sort that women with pre-school age children are any less capable, efficient, trustworthy, or otherwise less valuable employees than men with such children. Rather, respondent has attempted to gain the benefits which the law extends to a BFOQ without any evidence of such. Congress can hardly have intended to permit this. If employers were permitted to impose sex-related stan-

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[7] Respondent apparently doubted that it could establish a BFOQ exemption and did not even bother to raise it as a possible defense below. However, in its Brief in Opposition to Petition for Certiorari, respondent indicates that it has second thoughts on the matter and will attempt to assert a BFOQ in the event it loses this appeal.

dards without establishing a BFOQ, the special statutory exemption with its strict limitations would become meaningless. Since respondent has neither used a neutral standard nor established a BFOQ, the company has not recognized the "different responsibilities" of men and women in a way permitted under Title VII. The District Court therefore erred in sustaining the company's practice on this ground.

2. The "sex-plus" principle established by the Court of Appeals decision threatens the effectiveness of the entire federal fair employment law generally and conflicts in principle with other Court of Appeals decisions.

In the words of Chief Judge Brown, dissenting below:

> If "sex-plus" stands, the Act is dead (A. 48a).

It is not difficult to see why this is not an exaggeration. We have already seen the first extension of the "sex-plus" rule—*Lansdale* v. *United Airlines*, 62 Lab. Cas. ¶9417. (S.D. Fla. Dec. 2, 1969), where the court upheld an employer policy of discharging married women, while retaining married men. Thus far, the rule has permitted the exclusion of women with pre-school age children and married women. What is next? Possibly young women—who may distract male workers. All of this could be justified on the ground that the discrimination was not against women as such, but rather only against those women who did not meet the special standard, and that this is "sex-plus".

If employers are thus free to exclude groups of women under the "sex-plus" rule, without having to meet the BFOQ test, the door is open to such vast erosion of female employment opportunity that Title VII will have no meaning. Moreover, if "sex-plus" is not sex discrimination, then it is

difficult to understand why "race-plus" is not exempted from the race discrimination prohibition in the Act.[8]

Even if the "sex-plus" rule is not greatly expanded, it will deal a serious blow to the objectives of Title VII when applied solely to exclude mothers of pre-school age children. If the law against sex discrimination means anything it should protect employment opportunities for those groups of women who most need jobs because of economic necessity. Working mothers of pre-schoolers are such a group. Almost twenty-nine percent of all mothers with pre-school age children (under 6 years old) work, a total of 4.1 million mothers as of 1967.[9] The number of working mothers with pre-school age children is continuing to rise.[10] Studies show that, as compared to women with older children or no children, these mothers of pre-school children were much more likely to have gone to work because of pressing need.[11] Forty-eight percent of mothers of pre-school children work because of financial necessity and 8 percent because their husbands are unable to work.[12] Frequently, these women are a key or only source of income for their families.

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[8] While courts so far have not made this mistake in race cases, the decision below now opens that possibility. So far, a union rule requiring that applicants be recommended by present members in *Vogler, supra* and a union referral system which gave preference to men with previous referrals in *United States* v. *Sheet Metal Workers, Local 36, supra*, were both struck down.

[9] U. S. Dept. of Labor, Women's Bureau, Background Facts on Women Workers in the United States, 8 (Sept. 1968). This data includes only those classified as "ever married" by the Labor Department.

[10] U. S. Dept. of Labor, Women's Bureau, Working Mothers and the Need for Child Care Services, 7-8 (June 1968).

[11] Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review, Sept. 1965, at 1077-79, Table I.

[12] *Ibid.*

The extent to which exclusion of mothers of pre-school children is contrary to Title VII becomes even more apparent upon examination of the racial impact of this exclusion. Its primary adverse impact is on blacks.

> [There is] no tendency for blacks in child bearing ages to retire even temporarily from the labor force. This situation is explained not only by the high incidence of poverty in the Negro community and the economic weakness of Negro males, but also by the large proportion of fatherless families.[13]

In 1967, nearly half of the non-white women in the working force had children under six years of age.[14] In contrast, only one-fourth of the white mothers had children under six.[15] These women tend to be family heads, responsible for the economic survival of their children. More than twice as many non-white mothers as white mothers are heads of families.[16]

Black women suffering under the double discrimination of race and sex are the most oppressed group of workers in the society. As women they earn much less than men. In 1966, the average yearly income of fully employed women was only 58% of the average yearly income of fully employed men.[17] And for black women the situation was even worse: for 1964 their average yearly income was only 70%

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[13] Ross and Hill, eds., *Employment, Race and Poverty*, 23 (1967).

[14] U. S. Dept. of Labor, Women's Bureau, Who Are the Working Mothers? Leaflet 37 (1968).

[15] *Ibid.*

[16] U. S. Department of Labor, *The Negro Family—The Case for National Action* (March 1965).

[17] U. S. Dept. of Labor, Background Facts on Women Workers in the United States (September 1968).

of that of white women.[18] An important factor in this low income situation is the large number of black women working as domestics or in other service work outside the coverage of minimum wage laws.[19] Families dependent on such a breadwinner need every possible aid in breaking out of this bottom rung employment category and gaining decent factory and office work, such as that at the Martin Marietta Company. Title VII was designed to contribute to that effort and can do so significantly is "sex-plus" is firmly rejected.

3. The "sex-plus" principle has been rejected by the EEOC, whose rulings were improperly rejected by the Court of Appeals.

The importance of rulings and regulations of an administrative agency charged with enforcement of a statute has been established in a long line of cases. See *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931); *United States* v. *American Trucking Assn.*, 310 U.S. 534, 549 (1940); *United States* v. *Public Utilities Comm.*, 345 U.S. 295, 314-15 (1953); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 391 (1959). These cases emphasize judicial reliance on the special expertise of administrative agencies and their ability to apply relevant statutes to practical situations. In particular, several lower courts have relied upon the expertise of the Equal Employment Opportunity Commission. *Int'l Chem. Workers* v. *Planters Mfg. Co.*, 259 F. Supp. 365, 366-67 (N.D. Miss. 1966); *Cox* v. *U.S. Gypsum Co.*, 284 F. Supp. 74, 78 (N.D. Ind. 1968), *aff'd as modified*, 409 F. 2d 289 (7th Cir. 1969).

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[18] U. S. Dept. of Labor, Bureau of Labor Statistics, Special Labor Forces Report (1964).

[19] U. S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, May 1963, Table A-21.

Due to the confidential nature of much of the work of the EEOC, only a small portion can be documented to this Court; yet it should be emphasized that any ruling or regulation promulgated by the EEOC derives from its broad experience in dealing with thousands of cases under the statute. More importantly, the EEOC is clearly in the best position to assess the long-run implications of "sex-plus" discrimination. The situation is thus very similar to that in *FTC* v. *Colgate-Palmolive Co., supra*, where the Court observed:

> as an administrative agency which deals continually with cases in the area, the Commission [FTC] is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act [FTC Act]. This Court has frequently stated that the Commission's judgments be given great weight by reviewing courts. 380 U.S. at 385.

The Court while noting that the courts have the final say, sustained the position of the FTC.

The EEOC has come out foursquare against the "sex-plus" theory of the court below. The Commission's Equal Employment Opportunity Sex Discrimination Guidelines deal specifically with this question in the context of married women:

> The Commission had determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex. 29 C.F.R. §1604.3 (1968)

The EEOC has backed up its views with amicus participation in this case in the Court of Appeals and a Petition for Certiorari before this court.

The importance of deferring to this regulation takes on particular meaning in light of the EEOC's role in Title VII enforcement. The EEOC, like other administrative agencies, promulgates rulings and regulations based on its expertise. Unlike most other agencies, however, the EEOC has no power to enforce its regulations and must rely on voluntary compliance by employers. This initial reliance on voluntary conciliation is a hallmark of Title VII. See 110 Cong. Rec. 2566 (1964) (discussion of amendment clarifying conciliation agreement); House Rep. No. 570 at H.R. 405, 88th Cong., 1st Sess. (1963) (report on earlier version of Title VII). Thus, critical to the efforts of the EEOC to perform this role delineated by Title VII is recognition of its expertise by the courts. Given such recognition, employers would not lightly disregard the EEOC and would be encouraged to settle through conciliation. On the other hand, should the EEOC regulations not be given substantial effect, the Commission itself would exert but little influence, and the full burden of Title VII enforcement would fall upon the courts. This is clearly not the pattern that Congress intended when it established a conciliation commission as the front line in Title VII enforcement.

We submit that the Court of Appeals gave insufficient weight to EEOC regulations. The decision below should be reversed for that reason as well as others advanced in this brief.

CONCLUSION

For the foregoing reasons the judgment below should be reversed and remanded.

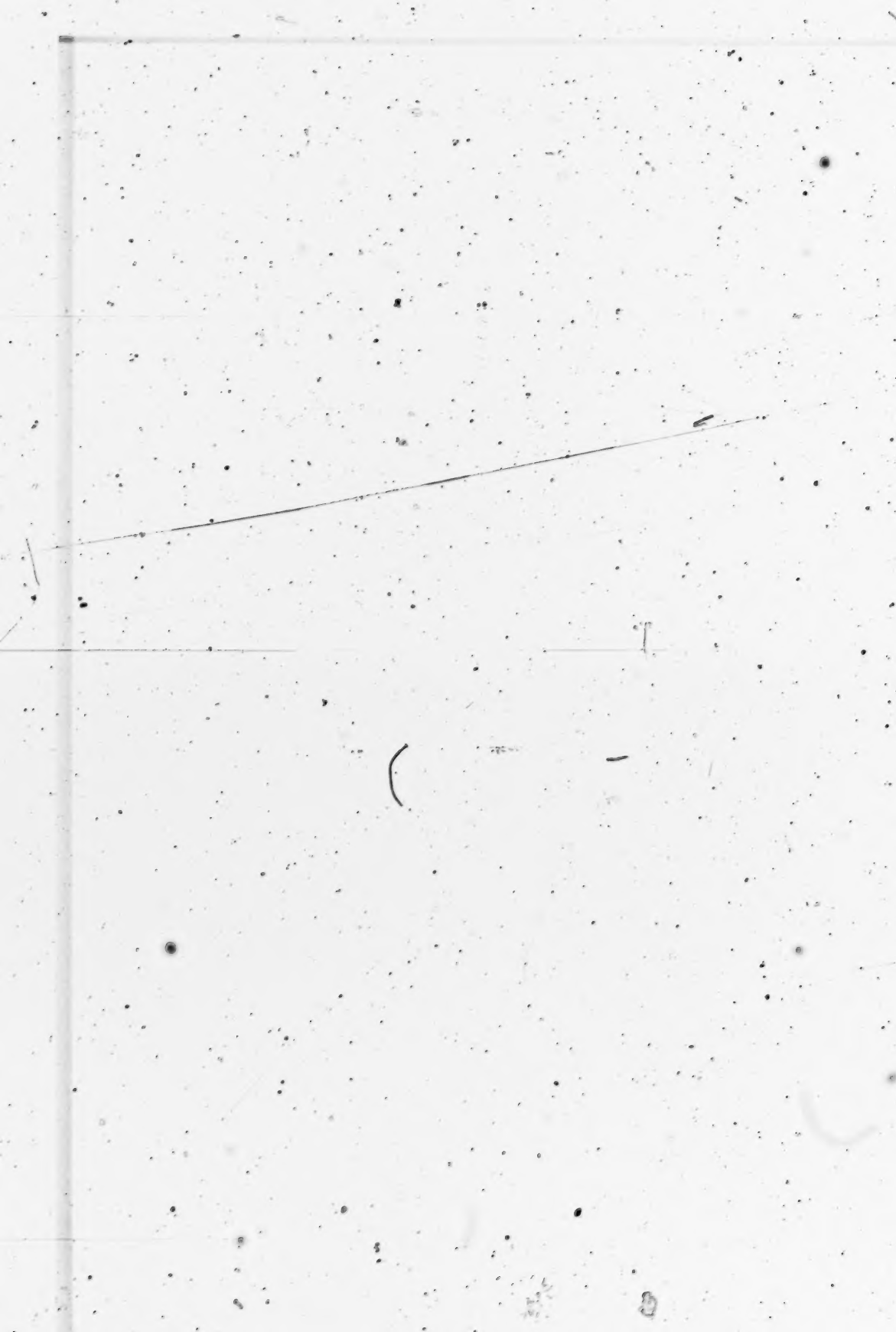
Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

GEORGE COOPER
CHRISTOPHER CLANCY
401 West 117th Street
New York, New York 10026

Attorneys for Petitioner



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No. [redacted] 73

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

[redacted]

IDA PHILLIPS,

Petitioner,

v.

MARTIN MARIETTA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF HUMAN RIGHTS FOR WOMEN, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

SYLVIA ELLISON
Attorney, Human Rights for Women, Inc.
Mailing Address:
P.O. Box 7402
Ben Franklin Station
Washington, D.C. 20044

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

v.

MARTIN MARIETTA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF HUMAN RIGHTS FOR WOMEN, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

Pursuant to Rule 42 of the Rules of the Supreme Court, Human Rights for Women, Inc., by its counsel, moves the Court for leave to file a brief amicus curiae, and for reasons states as follows:

1. Human Rights for Women is a non-profit tax exempt corporation organized in the District of Columbia. Its purposes are to provide legal assistance in litigation involving rights of women under the law, to undertake research on issues relevant to discrimination against women, and to provide for educational projects on conditions concerning women. The issues in this case are highly significant in defining the rights of women under the law, a matter of central concern to Human Rights for Women.

2. Human Rights for Women is the first (and we believe only) tax exempt corporation which is devoted exclusively to problems of sex discrimination and which has furnished free legal counsel to women in Title VII cases. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7, 1969); *Mengelkoch v. Industrial Welfare Commission*, 284 F.Supp. 950, 956 (C. D. Calif., 1968), appeal now pending in the Ninth Circuit. HRW filed a brief *amicus curiae* in the appeal of *Rosenfeld v. Industrial Welfare Commission*, 293 F.Supp. 1219 (C. D. Calif.), now pending in the Ninth Circuit. HRW attorneys furnished informal assistance and advice to plaintiff's counsel in the appeal of *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (C.A. 5, 1969). Besides the instant case, these four cases are the most significant Title VII sex-discrimination cases to reach the appellate level to date.

3. This case involves important issues of interpretation of Title VII of the Civil Rights Act of 1964, which is designed to protect women against discrimination in employment because of sex. It is the first Title VII case involving sex discrimination to be considered on the merits by this Court. Neither the petition for writ of certiorari filed by counsel for Ida Phillips nor the supporting brief of the United States as *amicus curiae* on petition for writ of certiorari argues, as does the attached HRW *amicus* brief, that the "sex plus" theory of the Fifth Circuit in this case is wrong because under Title VII "sex" cannot be *even one* element in employment consideration. The Ida Phillips petition argues that sex plus the additional element (parent of preschool age children) has not been shown to be a "bona fide occupational qualification," while the United States' supporting brief argues that the employer has not shown that its rule against the combination of sex and pre-school age children is a "business necessity." These represent two different analyses of the issue in this case, both of which, we submit, are misleading. The HRW brief presents, in our opinion, the only correct interpretation of the essential meaning of the nondiscrimination provisions of the statute.

4. Although HRW is opposed to class discrimination in any form, believing that individuals should be judged on their own qualities and not pre-judged on the basis of presumed class characteristics, HRW's focus is on discrimination against the class of women. On the other hand, the interests and concerns of the attorneys for Ida Phillips have been primarily in the area of racial discrimination. The Justice Department, which represents the United States, has until the instant case devoted little of its concern and resources to the problem of sex discrimination and has concentrated mainly on race discrimination. It is necessary that the views of uncompromising advocates of sex equality be considered in this case to make certain that the Court is not misled into including in its decision dictum concerning the "bona fide occupational qualification" or "business necessity" which could hurt women in other Title VII cases as well.

5. Although attorneys for Ida Phillips have provided written consent to the filing of an *amicus* brief by Human Rights for Women, the attorney for Martin Marietta Corporation by letter dated April 7, 1970, declined to furnish such written consent, which has necessitated the filing of this motion.

WHEREFORE, Human Rights for Women, Inc. respectfully requests this Court to permit the filing of its *amicus curiae* brief, which is attached.

SYLVIA ELLISON

Attorney, Human Rights for Women, Inc.

P. O. Box 7402
Ben Franklin Station
Washington, D.C. 20044

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion of Human Rights for Women, Inc. for Leave to File *Amicus Curiae* Brief and its attached Brief of Human Rights For Women, Inc., as *Amicus Curiae* upon the parties in this case by mailing copies thereof, via air mail, in postage paid envelopes addressed as follows:

Jack Greenberg, James M. Nabrit, III, Norman C. Amaker, William L. Robinson, Lowell Johnston, and Vilma Martinez Singer, 10 Columbus Circle, New York, N.Y. 10019;

Earl M. Johnson, 625 West Union Street, Jacksonville, Florida 32202;

George Cooper, 435 West 116th Street, New York, N.Y.; and

J. Thomas Cardwell, P.O. Box 231, Orlando, Fla. 32802

This April , 1970.

Sylvia Ellison

SUPREME COURT, U. S.

FILED

No. [redacted] 73

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1973

IDA PHILLIPS, PETITIONER

v.

MARTIN MARIETTA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,

JEROME M. FEIBLEMAN,
Assistant Attorney General,

LAWRENCE G. WALLACE,
Assistant to the Solicitor General,

ROBERT T. MOORE,
Attorney,
Department of Justice,
Washington, D. C. 20530.

STANLEY P. HEBERT,
General Counsel,
Equal Employment Opportunity Commission,
Washington, D. C. 20506.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Introduction and summary of argument	4
Argument	7
Conclusion	14

AUTHORITIES CITED

Cases:

A. H. Phillips, Inc. v. *Walling*, 324 U.S. 490	10
Anderson v. *Martin*, 375 U.S. 399	13
Bowe v. *Colgate-Palmolive Co.*, 416 F.2d 711	11
Carrington v. *Rash*, 380 U.S. 89	11
Cheatwood v. *South Central Bell Telephone Co.*, 303 F. Supp. 754	11
Gaston County v. *United States*, 395 U.S. 285	13
Goss v. *Board of Education*, 373 U.S. 683	8
Griggs v. *Duke Power Co.*, C.A. 4, No. 13,013, decided January 9, 1970	13
Guinn v. *United States*, 238 U.S. 347	13
King v. *Smith*, 392 U.S. 309	5
Lane v. *Wilson*, 307 U.S. 268	8, 13
Lansdale v. *United Air Lines*, 62 Lab. Cas. ¶ 9417	12
Lewis v. *Martin*, No. 829, this Term, decided April 20, 1970	5
Local 53, International Association of Heat and Frost Insulators v. *Vogler*, 407 F.2d 1047	13
Local 189, Papermakers and Paperworkers v. *United States*, 416 F.2d 980, certiorari denied, February 24, 1970, No. 1015, this Term	7, 13
Louisiana v. *United States*, 380 U.S. 145	13
National Labor Relations Board v. *Hearst Publications*, 322 U.S. 111	13

Cases—Continued Page

Robinson v. *Florida*, 378 U.S. 153 8
Rosenfeld v. *Southern Pacific Co.*, 293 F. Supp. 1219 11
Sprogis v. *United Air Lines*, 62 Lab. Cas. ¶ 9399 12
Udall v. *Tallman*, 380 U.S. 1 13
United States v. *Correll*, 389 U.S. 299 13
United States v. *Sheet Metal Workers*, 416 F.2d 123 13
Weeks v. *Southern Bell Telephone Co.*, 408 F.2d 228 ..... 10, 11

Statutes:

Civil Rights Act of 1964, Title VII, Section 703, 78 Stat. 255 ..... 2, 3, 4, 6, 8, 10, 11, 12, 13
42 U.S.C. 2000e-2(a)(1) 2, 10, 13
42 U.S.C. 2000e-2(e)(1) 2, 8, 10, 11, 13
Equal Pay Act of 1963, 29 U.S.C. 206(d) 10

Miscellaneous:

110 Cong. Rec. 2582 9
110 Cong. Rec. 2583 9
110 Cong. Rec. 2720 9
110 Cong. Rec. 7213 10
110 Cong. Rec. 13837-13838 9
Equal Employment Opportunity Comm., "Guidelines on Discrimination Because of Sex", 29 C.F.R. §§ 1604.1-3 12
H. Rep. No. 914, 88th Cong., 1st Sess. 10
President Nixon's Address to the Nation on Domestic Programs, Weekly Compilation of Presidential Documents, Vol. 5, No. 32, August 1, 1969, p. 1108 5
Who are the Working Mothers?, U.S. Dept. of Labor, Wage and Labor Standards Adm., Women's Bureau (Leaflet 37, revised January, 1970) 11

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (A. 30a-38a) is reported at 411 F.2d 1. That court's denial of rehearing and rehearing *en banc*, with three judges dissenting (A. 42a-52a), is reported at 416 F.2d 1257. The opinion of the district court (A. 22a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 39a) was entered on May 26, 1969. Timely petitions for

rehearing and rehearing *en banc* were denied on October 13, 1969 (A. 42a-43a). The petition for a writ of certiorari was filed on January 10, 1970, and granted on March 2, 1970 (A. 55a). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, an employer may, in the absence of business necessity, refuse to hire women with pre-school age children while hiring men with such children.

STATUTE INVOLVED

Section 703 of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

42 U.S.C. 2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

* * * *

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin

is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

STATEMENT

On September 6, 1966, petitioner was denied employment as an assembly trainee by the respondent corporation solely because she was a woman with pre-school age children (A. 3a-4a, 16a-17a). She filed a charge of discrimination with the Equal Employment Opportunity Commission, and, on July 14, 1967, the Commission found reasonable cause to believe that the respondent had "violated Title VII of the Civil Rights Act of 1964 by its refusal to consider a woman with pre-school age children for employment" (A. 10a). On November 9, 1967, the Commission notified petitioner that its conciliation efforts had failed to achieve voluntary compliance (A. 11a-12a). Petitioner then brought the present suit to enforce her rights under Title VII.

For purposes of ruling on the respondent's motion for summary judgment, the district court assumed that respondent "does employ males with pre-school age children in the position of Assembly Trainee" (A. 23a). But the court eliminated the essence of the petitioner's complaint by striking, as beyond the reach of the statute, the allegation of discrimination directed particularly against mothers with pre-school age children (A. 22a). Thus viewing the complaint as simply alleging discrimination based solely on sex, the court granted the respondent's motion for summary judgment, on the basis of an uncontroverted

showing that a larger percentage of the women, as compared with the men, who applied for the position of assembly trainees were hired.

The court of appeals affirmed, stating (A. 36a):

> * * * The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. * * *

A petition for rehearing was denied (A. 42a-43a), with three judges dissenting from the denial of rehearing *en banc* (A. 43a-52a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Civil Rights Act of 1964, Congress has entrusted the United States Equal Employment Opportunity Commission and the Attorney General with important responsibilities for the enforcement of the prohibitions in Title VII of that Act against discrimination in employment based on race, color, religion, sex or national origin. The holding below—that an employment practice under which women, but not men, were required to be wholly without preschool age children does not violate the statute's proscription against discrimination on the basis of sex—is in conflict with the interpretation of the statute

followed by the Equal Employment Opportunity Commission and is contrary to the federal policy of encouraging unemployed women with pre-school age children to seek gainful employment as an alternative to welfare payments.[1]

The decision below directly affects a substantial number of women in the labor market, many of whom are the sole or principal income-producing member of households with children and thus are among those in our society least able to afford restrictions upon their employment opportunities.[2] The burden falls

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[1] See, *e.g.*, President Nixon's Address to the Nation on Domestic Programs, Weekly Compilation of Presidential Documents, Vol. 5, No. 32, August 11, 1969, p. 1108:

> As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However, these would be day-care centers with a difference. There is no single idea to which this administration is more firmly committed than to the enriching of a child's first 5 years of life, and thus helping lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves.

Moreover, as principal financial contributor to the Aid to Families with Dependent Children Program administered by the States under the Social Security Act (as well as in its role as tax collector), the United States has a fiscal interest in the consequences of this litigation. See *King* v. *Smith*, 392 U.S. 309; *Lewis* v. *Martin*, No. 829, this Term, decided April 20, 1970.

[2] In March 1968, fourteen percent (4.1 million) of all women in the labor market were mothers with children un-

heaviest among Negroes and other non-whites.[3] Moreover, application to the prohibitions in Title VII against discrimination based on race, color, religion, or national origin of the rationale adopted by the court of appeals[4] would comprehensively limit the Act's effectiveness in insuring equality of employment opportunities for all persons in the United States. Under this reasoning, the Act would, for example, have no application to discrimination against Catholics with children, or against Scandinavians with education beyond the sixth grade.

The holding of the court of appeals that employment qualifications not required of men can be imposed on women, without the justification of business necessity, is contrary to both the language and the legislative history of Title VII. To require of prospective women employees that they not have preschool age children, while not requiring the same of men, is to discriminate against women on the basis

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der six years of age. Of this number, 33 percent were either heads of their households or had husbands whose incomes were below $5,000 in 1967. *Who Are the Working Mothers?*, U.S. Department of Labor, Wage and Labor Standards Adm., Women's Bureau (Leaflet 37, revised January, 1970).

[3] Among all non-white mothers with children under six years of age, a larger percentage worked (45 percent) than did white mothers with such children (27 percent). *Ibid.* A revision of this leaflet to be published in May 1970 will show substantially the same figures as of March 1969 as those used here and in note 2, *supra*.

[4] "When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin" (A. 35a).

of sex in the "terms" or "conditions" they must meet to be employed—which is precisely what the Act in terms forbids, in the absence of a showing of overriding business necessity.

ARGUMENT

The summary judgment in this case was based on the factual premise that the respondent excludes women, but not men, with pre-school age children from employment as assembly trainees, and that it does so without regard or inquiry as to whether the individual women affected are capable of regular attendance or are otherwise able satisfactorily to perform the work required. No evidence was offered to establish that this hiring practice was predicated on any legitimate business consideration related to the ability of such women to perform the work, or to the safety and efficiency of the respondent's business operations. Specifically, there was no showing that such women as a class had a higher than average absentee rate, that they could not work certain shifts or necessary overtime, or that they had any other attribute which limited their utility to the respondent. Much less did respondent show that *all* women with pre-school age children were unable to perform adequately.

The courts below, therefore, did not rely on any "overriding business necessity," [5] and thus did not invoke the statutory exception for a "bona fide occu-

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[5] See *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 989 (C.A. 5), certiorari denied, February 24, 1970, No. 1015, this Term.

pational qualification,"[6] in holding that the respondent's hiring policy did not violate Title VII. Instead, the court of appeals' holding is explicitly based on a construction of the statute which condones discrimination on the basis of sex so long as there is an additional, apparently neutral, reason for the otherwise unlawful employment practice.

This holding contravenes the plain language of Section 703 which makes it an "unlawful employment practice for an employer * * * to fail or refuse to hire * * * or otherwise to discriminate against any individual with respect to his * * * terms [or] conditions * * * of employment, because of such individual's race, color, religion, sex, or national origin * * *." To require of prospective women employees that they not have pre-school age children, while not requiring the same of men, is to "refuse to hire" on the basis of sex and constitutes discrimination against women in the "terms" or "conditions" they must meet to be employed. The fact that some women, even if the number is substantial, have met this "term" or "condition" does not eliminate the disparate treatment received by those women who do not met this qualification which is not required of men. So long as sex determines to whom an employment qualification is applied, the qualification is a form of employment discrimination based on sex which is proscribed by the Act unless justified as a "bona fide occupational qualification." Cf. *Lane* v. *Wilson*, 307 U.S. 268; *Goss* v. *Board of Education*, 373 U.S. 683; *Robinson* v. *Florida*, 378 U.S. 153.

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[6] Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1), *supra*, pp. 2-3.

The court of appeals' contrary holding—that "[a] per se violation of the Act can only be discrimination based solely on one of the [Act's prohibited] categories" (A. 35a)—is also refuted by the Act's legislative history. The Senate, by a roll call vote, specifically rejected a proposed amendment which would have inserted the word "solely" in Title VII prior to each enumeration of the specifically proscribed categories. 110 Cong. Rec. 13837-13838. In speaking against the proposal, Senator Case, a joint floor manager of Title VII, noted that the "difficulty with this amendment is that it would render Title VII totally nugatory. * * * [It] would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless." *Id.* at 13837.[7] Nor is there support in the legislative history for the court of appeals' apparent conclusion that Congress intended to allow employers to base their employment practices upon unsupported presumptions about "the differences between the normal relationships of working fathers and working mothers to their pre-school age children * * *" (A. 37a). Instead, the intent of Congress was to insure women (and others) equal opportunity to obtain and hold employment[8]—an objective consistent with its

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[7] See, also, the remarks of Senator Magnuson to the same effect. 110 Cong. Rec. 13837. And see the opinion in this case dissenting from denial of rehearing *en banc* (at A. 49a-52a).

[8] See statements of Congresswomen May (110 Cong. Rec. 2582), Kelly (110 Cong. Rec. 2583) and Bolton (110 Cong. Rec. 2720). See, also, *Weeks* v. *Southern Bell Telephone*

earlier enactment of legislation guaranteeing women equal pay for equal work.[9]

The statute provides for exception to the broad mandate of Section 703(a) against sex discrimination only upon a showing that such an exception constitutes a "bona fide occupational qualification" within the meaning of Section 703(e)(1). Since Title VII is a humanitarian and remedial statute serving an important public purpose, such an exception should be narrowly construed. See *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493. Indeed, the court below had previously pointed out that "[t]he legislative history [of Title VII] indicates that this exception was intended to be narrowly construed." *Weeks* v. *Southern Bell Telephone Co.*, 408 F.2d 228, 232 (citing 110 Cong. Rec. 7213 and H. Rep. No. 914, 88th Cong., 1st Sess.). Accordingly, in order to rely upon this exemption, the respondent in this case would have to prove that all, or substantially all, women with pre-school age children are significantly

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Co., 408 F.2d 228 (C.A. 5), where, in rejecting an assertion that it should be permissible to bar women from a certain job classification because it occasionally necessitated "late hour call-outs," the court stated (*id.* at 236):

> * * * Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. * * *

[9] Equal Pay Act of 1963, 29 U.S.C. 206(d).

less able or willing than other employees to make arrangements for the care of their children, or are otherwise materially less satisfactory in performing the work of assembly trainees, so as to justify the total exclusion of such women as (in the words of Section 703(e)(1)) "reasonably necessary for the normal operation of that particular business or enterprise." [10] The whole meaning and purpose of Title VII is that such women (or any other category of employees limited by race, color, religion, sex, or national origin) cannot be barred from employment merely on the factually unsupported premise that they as a class are less dependable or efficient employees. Instead, the respondent must, in the absence of proper proof of overriding business necessity, provide such women individually the same opportunity to demonstrate their ability to perform the job as is provided other employees, including similarly situated men. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7); *Weeks* v. *Southern Bell Telephone Co.*, *supra*; *Rosenfeld* v. *Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Calif.); *Cheatwood* v. *South Central Bell Telephone Co.*, 303 F. Supp. 754 (M.D. Ala.). Cf. *Carrington* v. *Rash*, 380 U.S. 89, 96. In contrast to the decision below, those above-cited con-

[10] Working mothers do make arrangements for the care of their children. In February 1965, 47 percent of such children were cared for in their own homes by other members of the household, 31 percent were cared for in the homes of others, and 6 percent received group care in child-care centers or other similar facilities. Sixteen percent were cared for by other arrangements. *Who Are the Working Mothers?*, U.S. Department of Labor, Wage and Labor Standards Adm., Women's Bureau (Leaflet 37, revised January, 1970). See, also, n.1, *supra*.

form with, and rely upon, the Equal Employment Opportunity Commission's published interpretations of Section 703.[11] Since that agency has been charged

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[11] The Commission's "Guidelines on Discrimination Because of Sex," 29 C.F.R. § 1604.1(a), state in pertinent part:

> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. * * * The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

Moreover, at 29 C.F.R. § 1604.3(a), the Commission specifically addressed itself to discrimination against married women as follows:

> (a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

In *Sprogis* v. *United Air Lines*, 62 Lab. Cas. ¶ 9399 (N.D. Ill., January 21, 1970), this rationale was applied to an employer's practice of firing female stewardesses, but not male stewards, who married. Within the Fifth Circuit, however, a contrary result was reached on the same facts because of the decision below. *Lansdale* v. *United Air Lines*, 62 Lab. Cas. ¶ 9417 (S.D. Fla. December 2, 1969).

by Congress with the primary responsibility for the administration of Title VII, its interpretations of the statute are of course entitled to deference. See *United States* v. *Correll*, 389 U.S. 299, 306-307; *Udall* v. *Tallman*, 380 U.S. 1, 16; *NLRB* v. *Hearst Publications*, 322 U.S. 111.

Title VII forbids the imposition of any term or condition of employment which adversely affects an individual on the basis of his race. *United States* v. *Sheet Metal Workers International Association*, 416 F.2d 123 (C.A. 8); *Griggs* v. *Duke Power Co.*, C.A. 4, No. 13,013, decided, January 9, 1970; *Local 53, International Association of Heat and Frost Insulators* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (C.A. 5).[12] An employer's refusal to hire otherwise qualified Negroes with preschool age children, while hiring whites with such children, is obviously proscribed. Since Section 703 (a)(1) (*supra*, p. 2) textually affords the same protection against discrimination in employment whether based on sex or race, the respondent's hiring practice here is equally prohibited in the absence of proof of an overriding business necessity (Section 703(e)(1), *supra*, pp. 2-3). To hold otherwise would be to deny the Act's protection to some of the employment applicants most in need of that protection.

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[12] This principle follows from this Court's Fourteenth and Fifteenth Amendment cases. See, *e.g.*, *Guinn* v. *United States*, 238 U.S. 347; *Lane* v. *Wilson*, *supra*; *Anderson* v. *Martin*, 375 U.S. 399; *Louisiana* v. *United States*, 380 U.S. 145; *Gaston County* v. *United States*, 395 U.S. 285.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

LAWRENCE G. WALLACE,
Assistant to the Solicitor General.

ROBERT T. MOORE,
Attorney.

STANLEY P. HEBERT,
General Counsel,
Equal Employment Opportunity Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

[redacted]

IDA PHILLIPS,

Petitioner,

v.

MARTIN MARIETTA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

SYLVIA ELLISON

Attorney, Human Rights for Women, Inc.

Mailing Address:

P.O. Box 7402
Ben Franklin Station
Washington, D.C. 20044

Washington, D.C. · THIEL PRESS · 202 · 393-0625

INDEX

Question presented 1

Interest of Human Rights for Women 1

Statement 2

Argument:

1. If sex is even *one* element considered in hiring an individual, no matter how it coalesces with other job criteria (relevant or irrelevant), the proscriptions of Title VII are violated 4

2. Title VII prohibits pre-judging an individual on the basis of sex by making a generalized assumption about women 5

3. Employer policies as to job requirements may not differentiate on the basis of sex, nor discriminate against women 8

4. The Court of Appeals interpretation of Title VII would nullify the protection of the law for the persons who are in greatest need of its protection 10

Conclusion 11

CITATIONS

CASES:

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (C.A. 7, 1969) . . . 6

Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (N.D. Ala., 1969) 7

Local 53 Int. Ass'n of Heat & Frost I.&A. Wkrs. v. Vogler, 407 F.2d 1047 (C.A. 5) 9

Local 189, Papermakers and Paperworkers v. United States, 416 F.2d 980 (C.A. 5), cert. denied, 38 L.W. 3320 . . . . . 8, 9

Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va.) . . . 8

Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore., 1969) 7

Rosenfeld v. Southern Pacific Co., 292 F. Supp. 1219 (C.D. Calif.), appeal pending, C.A. 9 7

Tuten v. Southern Bell Telephone Co., 2 FEP Cases 299 (M.D. Fla., 1969) 7

Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (C.A. 5, 1969) 6

STATUTE:

Civil Rights Act of 1964, Title VII, 78 Stat. 241, 253, 42 U.S.C. 2000e *et seq.* 2

Sec. 703(a) 4

Sec. 703(e) 4

MISCELLANEOUS:

29 C.F.R. 1604.1(a)(1) 5, 6, 7

U.S. Dept. of Commerce, Bureau of the Census, CPR-60, No. 66, Table 41 11

U.S. Dept. of Labor, Fact Sheet on the American Family in Poverty, April 1968 11

U.S. Dept. of Labor, Monthly Statistics on the Woman Labor Force, data for May 1968 10

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BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, an employer may refuse to hire women with pre-school age children while hiring men with pre-school age children.

INTEREST OF HUMAN RIGHTS FOR WOMEN, INC.

Human Rights for Women, Inc. is a non-profit tax exempt organization, which was incorporated in the District of Columbia in December 1968. One of its purposes is to pro-

vide legal assistance without charge to women seeking to invoke their rights under the Constitution and statutes of the United States, particularly Title VII of the Civil Rights Act of 1964, relating to equal employment opportunity. A major portion of HRW's efforts and financial resources have been devoted to furnishing free legal counsel for women in Title VII cases.

Human Rights for Women is deeply concerned with a clear and proper interpretation of Title VII as it applies to sex dsicrimination and with equal protection of the law for women. The decision of the Fifth Circuit in this case endangers the protection of nondiscrimination legislation for women and for all discriminated-against classes. HRW believes that the Fifth Circuit has confused and misinterpreted Title VII by holding that it permits the refusal to hire an individual who possesses the characteristics of being (a) a female and (b) a parent of pre-school age children. This case presents a unique opportunity to clarify and define what prejudice and discrimination really mean and the scope of the proscriptions of the Federal statute prohibiting discrimination in employment.

STATEMENT

Martin Marietta Corporation refused to hire Ida Phillips for the position of assembly trainee, advising her that the company does not consider female applicants with pre-school age children for such position, although male applicants with such children are considered. (Pet. App. 2a) Mrs. Phillips complained that her rights under Title VII of the Civil Rights Act of 1964 had been violated. (78 Stat. 241, 253, 42 U.S.C. 2000e *et seq.*)

The District Court struck the portion of the complaint alleging discrimination against women with pre-school age children and then granted the company's motion for summary judgment based on an uncontroverted showing that a

larger percentage of women applicants than men applicants were hired for the position of assembly trainee. (Pet App. 5a-6a)

The Court of Appeals affirmed, reasoning that a violation of Title VII—

> can only be discrimination based solely on one of the categories i.e. in the case of sex; women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin. (Pet. App. 8a-9a)

The Court of Appeals further explained its theory of Title VII as follows:

> The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. (Pet. App. 9a-10a)

A petition for rehearing was denied, with Chief Judge Brown, joined by Judges Ainsworth and Simpson, dissenting from the denial. (Pet. App. 12a-13a)

ARGUMENT

We agree with dissenting Chief Judge Brown of the Fifth Circuit that if the above quoted "sex plus" interpretation of Title VII is permitted to stand, "the Act is dead." (Pet. App. 18a) We submit that the Court of Appeals interpretation of Title VII is wrong for the following reasons:

1. If sex is even *one* element considered in hiring an individual no matter how it coalesces with other job criteria (relevant or irrelevant) the proscriptions of Title VII are violated.

The very essence of fair employment legislation is to require the exclusion from consideration of the characteristics designated in the statute, e.g. sex, race. Section 703 (a) of the Civil Rights Act of 1964 (42 U.S.C. 4000e-2(a)) makes it an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

Race, color, religion, sex, and national origin are thereby *excluded* as permissible job qualifications. The employer and all his employment policies must in effect be blind to each of these characteristics of the individual applicant or employee.

Any other interpretation subverts the very purpose of the law. If the addition of a second qualification to a protected class can exempt an employer policy or practice from the prohibitions against nondiscrimination, then Catholics with more than two children can be discriminated against, blacks can be required to pass a special stringent test to qualify for a job, and Spanish-surnamed Americans can be required to have PhD's in English. Any employer could easily dream up ways to continue to give job preference to a favored class (e.g. white males) by adding a job qualification, relevant or irrelevant, for applicants of the protected classes he wishes to exclude.

The only qualification to the rule of Title VII that sex may not be an element singly or combined with other requirements in job considerations is contained in Section 703(e) of the Act (42 U.S.C. 2000e-2(e)), which provides

that it is not unlawful to hire or employ employees on the basis of the employee's sex (or religion or national origin)—

> in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Under this provision, if *maleness* is necessary to the performance of particular work, a woman need not be considered. Martin Marietta did not claim that sex (maleness) was a BFOQ and it is obvious that being male could not possibly be a BFOQ since "75 to 80 percent of those holding the positions [of assembly trainee] were *women*." (emphasis supplied). (Pet. App. 6a)

2. Title VII prohibits pre-judging an individual on the basis of sex by making a generalized assumption about women.

The Equal Employment Opportunity Commission's "Guidelines on Discrimination Because of Sex" specifically state that the following is a violation of Title VII (i.e. is not a BFOQ):

> The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men. 29 CFR 1604.1(a)(1)(i)

Under this rule, which we submit is correct, even if it could be proved (and it has been neither claimed nor proved) that women who are parents of pre-school age children are absent from work more often than men who are parents of such children, an assumption that an individual woman would likely follow that pattern is a forbidden basis for refusing to hire her. Fair employment legislation prohibits making a generalization about a protected class. Women, blacks, Jews, etc. must be treated as individuals and not be saddled with presumed generalized characteristics.

The EEOC guidelines also describe as unlawful—

> The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group. 29 CFR 1604.1(a)(1)(ii).

Employer policies that presume inabilities of women as a class to perform certain work have been held violative of Title VII. Thus the U.S. Court of Appeals for the Seventh Circuit reversed a District Court ruling that approved (as a BFOQ) an employer practice of allowing only men to work on jobs requiring the lifting of 35 pounds or more. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7, 1969). In that case the court stated that Colgate—

> must notify all of its workers that each of them who desires to do so will be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis. Each employee who is able to so demonstrate must be permitted to bid on and fill any position to which his or her seniority may entitle him or her. 416 F.2d at 718.

The Fifth Circuit held in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (C.A. 5, 1969), that a 30-pound weight lifting limitation on women workers does not make being a male a BFOQ, nor does the desire to "protect" women from having to work at night. The court pointed out—

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase

> in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise (408 F.2d at 236).

Similarly, in ruling that an Oregon weight lifting limitation on women workers violates Title VII, the court in *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969), stated:

> Except in rare and justifiable circumstances, 42 U.S.C. § 2000e-2(e), the law no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. 29 CFR § 1604.1(a). Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sexual groups. 300 F. Supp at 340.

See also, *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (N.D. Ala., 1969); *Rosenfeld v. Southern Pacific Company*, 292 F. Supp. 1219 (C.D. Calif.) appeal pending in Ninth Circuit; *Tuten v. Southern Bell Telephone Co.*, 2 FEP Cases 299 (M.D. Fla. 1969).

Thus, courts of appeals and district courts have approved the EEOC Guidelines on Sex Discrimination and interpreted the prohibitions against sex discrimination in Title VII as prohibiting general assumptions about the inabilities of women to meet certain *job qualifications*. 29 CFR 1604.1 (a)(ii). Certainly, general assumptions about *employment characteristics* (*ibid.*, subparagraph (i)) are likewise prohibited. Indeed, unlike job qualifications, where there are (though very few) instances in which sex itself is a BFOQ.[1]

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[1] The EEOC Guidelines state: "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress." 29 CFR 1604.1(a)(2).

[continued]

there is no comparable qualification in the law that an employer could use as a defense for a discriminatory generalization based on presumed employment characteristics of women. Any assumption that a female applicant who is a parent of pre-school age children would have less desirable employment characteristics than a male applicant who is a parent of such children is absolutely forbidden by Title VII. Such pre-judging of an individual is what prejudice *is*.

3. Employer policies as to job requirements may not differentiate on the basis of sex, nor discriminate against women.

Employers are of course free to adopt any employment policy, practice or rule consistent with law. To be consistent with Title VII any employment policy or practice—such as a policy of excluding persons who are parents of pre-school children—must be applied without regard to race, color, religion, sex, or national origin. Martin Marietta's policy in this case was applied only to female parents and not to male parents. It obviously differentiates on its face, on the basis of sex, and thereby violates the rights of women under Title VII. The Fifth Circuit has held that even where an employer rule or policy is neutral on its face, if it operates to discriminate against a protected class under Title VII (*e.g.*, women) the rule or policy must be changed unless there is an overriding legitimate non-racial (non-sex

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The BFOQ provision is *not* an exception in the normal sense of the term. It was not meant to undermine the basic prohibition of the Act and permit sex discrimination in employment. It is a mere clarification, which points out that sex may be relevant to employment in an extremely limited number of instances where "maleness" or "femaleness" is a job requirement. Where an employment classification or system is discriminatory, it is not "bona fide." See *Local 189 v. U.S.*, 416 F.2d 980, 988, and *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 517 (E.D. Va. 1968). Therefore the BFOQ provision creates no exception to Title VII and cannot be used as a defense to a system of sex discrimination in employment as such system is not "bona fide."

based) business purpose. See *Local 189, Papermakers and Paperworkers v. United States*, 416 F.2d 980, 989 (C.A. 5), cert. denied, 38 L.W. 3320; *Local 53, Int. Ass'n of Heat & Frost I.&A. Wkrs. v. Vogler*, 407 F.2d 1047, 1054 (C.A. 5). For instance, in *Local 189*, it was pointed out that under the "business necessity" principle an employer could require that employees placed in secretarial positions be able to type even though the requirement might mean the exclusion of disadvantaged black persons who had not had training in this field. (416 F.2d at 988-989).

In *Local 53, supra*, the court held that a nepotism system, neutral on its face, but used to exclude black employees from jobs, was a discriminatory system which could not be defended on the ground of "business necessity", even though there might be some incidental business advantages in using the system.

The "business necessity" argument thus comes into play only where a neutral rule, nondiscriminatory on its face, incidentally operates against a protected class (blacks or women) but for overriding business reasons rationally related to the duties involved in the job the rule is shown to be nondiscriminatory and thus not violative of the Act. Under no circumstances has any court held that business necessity can justify a discriminatory effect of an employment practice—and the whole issue cannot arise where the employment practice discriminates on its face, as in the instant case. It is not even relevant here.

To recapitulate, for an employer practice to be valid as a " business necessity"under Title VII, it would have to be all of the following:

(1) *Neutral on its face. E.g.*, if the policy applied with respect to single (divorced, widowed) *parents* of pre-school age children rather than to mothers, it would be neutral on its face.

(2) *Not discriminatory against women (or blacks) in its operation. E.g.*, if it is shown that more women than men

without spouses had the custody and care of pre-school age children, such neutral policy would operate to discriminate against women and would be violative of Title VII.

(3) *The policy itself must be relevant to the requirements of the job.* Parenthood obviously could not be. But a certain rate of absenteeism could be. Therefore, instead of assuming that parents will have a high rate of absenteeism, the policy must be *tailored to the job requirement, i.e.*, employees must comply with certain attendance rate requirements.

(4) *The policy must be applied on an individual basis and not on the basis of sex (or race, etc.)* Assuming, *arguendo*, that it could be shown that blacks or women as a class had a poorer attendance record, no such class presumption can be made with respect to an individual black or woman. This is the very kind of class pre-judging that Title VII forbids.

4. The Court of Appeals interpretation of Title VII would nullify the protection of the law for the persons who are in greatest need of its protection.

The purpose of Title VII of the Civil Rights Act of 1964 is to protect women and other classes from employment discrimination. Statistics on employment and earnings of women, as compared to men show that discrimination on the basis of sex inflicts the most severe economic damage on its victims and that, as a group, women heads of household with children to support suffer most.

Nearly half of all women 18 to 64 years of age are in the labor force. (Monthly Statistics on the Woman Labor Force, data for May 1968, U.S. Dept. of Labor.) Women with 1 to 3 years college earn less ($3714 for white women, $3706 for nonwhite women) than men with an eighth grade education (white men: $5184; nonwhite men: $4261). White women with 4 or more years of college earn less ($5301) than nonwhite men with only a high school education ($5721). Nonwhite women with 4 or more years of

college are better off ($6275) than white women ($5301), but nonwhite women are at the bottom in all lesser educational categories. The white male earns the most of all at all educational levels, a long standing privileged position with sex and race discrimination shielding him from fair competition. (Statistics for 1968, from U.S. Dept. of Commerce, Bureau of the Census; CPR-60, No. 66, Table 41.).

Eleven percent of American families are headed by women; 35% of these families live in poverty; 61% of the Nation's poor children live in families headed by women. (U.S. Dept. of Labor, "Fact Sheet on the American Family in Poverty", April 1968).

Women as a class, and especially women who are responsible for the support of children are in the greatest need of protection against discrimination afforded by Title VII. The ruling of the Fifth Circuit in this case judicially approves a discriminatory policy of a private employer and places women in the eyes of the law in a worse position than before the enactment of Title VII. Prior to Title VII, such private discrimination at least did not have the sanction of Federal law. Such a construction of Title VII cannot be permitted to stand.

CONCLUSION

The decision below should be reversed and remanded with instructions that judgment be entered for the plaintiff.

Respectfully submitted

SYLVIA ELLISON

Attorney, Human Rights for Women, Inc., as Amicus Curiae

MAY 14 1970 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION OF AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, FOR LEAVE TO FILE INSTANTER AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER.

AMICUS CURIAE BRIEF OF AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, IN SUPPORT OF PETITIONER.

GILBERT FELDMAN,
BARBARA JANE HILLMAN,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Amicus Curiae.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO [redacted] 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1058

IDA PHILLIPS,

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vs.

MARTIN MARIETTA CORPORATION,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION OF AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, FOR LEAVE TO FILE INSTANTER AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER.

Now comes Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO (hereinafter sometimes referred to as "ALSSA"), and moves the Court, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, for leave to file instanter an amicus curiae brief in support of Petitioner in this cause. In support of this motion, the following is shown:

(1) ALSSA is a voluntary unincorporated association and a labor organization and is the exclusive collective bargaining representative for in excess of 13,000 cabin attendants employed by 7 air carriers under the Railway Labor Act. Over 12,000 of these cabin attendants who are members of ALSSA are females.

(2) ALSSA in mid April of 1970 learned that the instant cause was pending before this Court, and, upon being further informed of the subject matter before the Court, ALSSA instructed its attorneys to seek leave to file an amicus curiae brief with the Court.

(3) ALSSA's attorneys did then immediately request consents from the attorneys for the parties in this cause for ALSSA to file an amicus curiae brief. On April 30, 1970, such consent was received by ALSSA from the attorneys for the Petitioner. On or about the same date, ALSSA received from the attorneys for the Respondent a communication in which such requested consent was refused.

(4) ALSSA has a special and almost unique interest in the issues before the Court in the instant case because of the nature of its membership and the problems that have accordingly arisen in collective bargaining with employers. In particular, ALSSA has been confronted with what has since been denoted by the Court of Appeals as "sex-plus" discriminations. This was, and in part still is, manifested in principally three categories, to-wit: (1) compulsory termination of female employees upon attainment of age 32 or age 35 (hereinafter sometimes referred to as "Age"); (2) compulsory termination of female employees because of marriage (hereinafter sometimes referred as a "Marriage"); and (3) compulsory termination of female employees because of pregnancy (hereinafter sometimes referred to as "Pregnancy"). In addition to the afore-

described situations involving termination, ALSSA is currently also being confronted with problems involving discriminations by employers based upon sex in hiring and promotions and in wages and other working conditions.

(5) Upon the enactment of Title VII of the Civil Rights Act of 1964, ALSSA, through a variety of measures and actions initiated and pursued by it, including litigation, negotiations, arbitration and use of the Equal Employment Opportunity Commission, has been successful in causing the elimination and reduction in the aforedescribed discriminations in employment as is indicated in the schedule below:

Carrier	Age	Marriage	Pregnancy
American Air Lines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Discrimination still exists.
Transworld Air Lines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Discrimination still exists.
Eastern Airlines, Inc.	No Employer Discrimination	Discrimination eliminated.	Discrimination eliminated.
Northwest Airlines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Partial-discrimination still exists.
Carribean Atlantic Airlines	No Employer discrimination.	Discrimination eliminated.	Discrimination still exists.
Northeast Airlines, Inc.	No Employer discrimination.	Discrimination eliminated.	Discrimination still exists.
Southern Airlines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Discrimination still exists.

(6) ALSSA believes that its ability to cause the elimination and reduction of the discriminations as aforesaid were in large part attributable to the enactment of Title VII and the moral and legal impact thereof upon employer carriers with whom ALSSA bargains. ALSSA further believes and suggests to the Court that, should the construction of Title VII and the rationale therefore stated by the Courts below be upheld, the effect would clearly be to cur-

tail or destroy the ability of ALSSA to further eliminate and reduce discrimination in employment based upon sex in the airline industry and might well even reeffectuate discriminations already eliminated.

(7) ALSSA further believes that its peculiar and extensive working experience with "sex-plus" discriminations in employment permits it to argue with special competence on that issue and on the full implications of the doctrine pronounced by the Fifth Circuit Court of Appeals.

Respectfully submitted,

GILBERT FELDMAN,
BARBARA JANE HILLMAN,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for ALSSA.

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THE INTEREST OF THE AMICUS CURIAE.

The question presented in this cause is whether the sex discrimination prohibition of Sec. 703 of the Civil Rights Act of 1964 is applicable to a refusal by an employer to hire women with preschool children when the employer hires men with preschool children. The Court of Appeals for the Fifth Circuit held that such conduct was not vio-

lative of the Act basically because it did not involve discrimination purely on account of sex but rather discrimination on account of sex plus another factor. The Amicus Curiae has a special interest in this legal determination because, in its capacity as the bargaining representative for over 13,000 cabin attendants employed by air carriers, in excess of 12,000 of them being females, it has continually been confronted with "sex-plus" type discriminations. Should the standard adopted by the Fifth Circuit be upheld, the Amicus Curiae will no longer have the benefit and support of federal law in its long standing efforts to eliminate discrimination based on sex in the employment of cabin attendants by air carriers.

ARGUMENT.

If the "Sex-Plus" Standard or Social Custom Standard Adopted by the Court of Appeals Is Sustained, Then the Act Is Rendered Largely Nugatory.

Two rationales are proposed by the Courts below in support of their respective constructions of the Act. The first is that employers are entitled to take into consideration the role normally imposed upon women in society,[1] and the

1. The District Court stated it thus: "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies." (See App. to Petit. for Cert., P. 2a.) The Court of Appeals similarly concluded when, referring to the assertion of the E.E.O.C. that Congress intended "to exclude absolutely any consideration of the differences between the normal relationship of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies . . . ", the Court responded: "The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute." (See App. to Petit. for Cert., P. 10a.)

second is that the Act is not broad enough in its prohibitions to encompass "sex-plus" discriminations.[2]

In discussing the first rationale, it is essential to note that the Courts below were not speaking within the framework of business-related concerns of an employer. These could be asserted as a defense under the "bona fide occupational qualifications" exception which is available to an employer under Sec. 703(e) of the Act, but which was not raised in this cause. To the contrary, therefore, the Courts below were adopting the proposition that, notwithstanding the prohibitions of this Act, the employer is entitled to give credence and effect to the social proposition that the proper place and role of a mother with pre-school age children is in the home and not at work. Moreover, if one is to accept this proposition, it is likewise left to the employer's discretion as to whether a mother who is the head of a household consisting of pre-school children is to work to support her family or is to go on the relief rolls.

Needless to say, neither Court below was able to demonstrate from either the language of the Act nor its Congressional history any support for this delegation of social decision-making to employers. It would be incongruous indeed for the Congress to legislate equal employment opportunities between the sexes and then to repose in employers a residual right to discriminate in the event that equality was abhorrent to the employer's sense of social propriety. We know of no anti-discrimination legislation which embodies that concept; the concept is patently the very antithesis of anti-discrimination.

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2. The Court of Appeals reasoned: "The discrimination was based on a two-pronged qualification, *i.e.*, a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm." (See App. to Petit. for Cert., Pp. 9a-10a.)

The plain fact is that social customs and expectations are often equivalent to social prejudices. This is easily demonstrated by the history of judicial implementation of the prohibition of discrimination on account of race, religion or color. It is equally applicable with respect to discrimination on account of sex. Hence, an exception based on social custom to the prohibition of discrimination on account of sex is tantamount to a surrender to social prejudices. It is unthinkable that Congress left the individual employer with discretion to enforce its interpretation of social prejudices in the field of employment.

The Amicus Curiae is particularly sensitive to the judicial consideration of the doctrine discussed above. Its concern flows from its role in representing cabin attendants on air carriers, to-wit: stewardesses, hostesses, stewards and pursers. For perhaps in no other field are social prejudices unrelated to work performance or other legitimate business considerations so pervasively based upon the sex of the employee. Should these prejudices be sanctioned by judicial decree, there can be no federally protected equality of work opportunity between the sexes among cabin attendants on airplanes.

The Second rationale adopted by the Court of Appeals is "sex-plus." It is respectfully submitted that the Court has engaged in a non sequitur in its reliance upon the additional criterion other than sex to justify its legal conclusion. The proscription in the Act makes its "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . ." The employer in the instant cause has applied a criterion to females to bar employment when it does not apply the same criterion to men. In no way can the words of the

Act be tortured or strained to permit that result. No matter how one reads the above language, Mrs. Phillips is being discriminated against because of her sex.

In actuality, "sex-plus" is no more than a declaration by the Court below that, although the Act prohibits blanket discrimination against *all* members of one sex in favor of the other sex, it does not prohibit discrimination against *some* members of the unfavored sex as compared to members of the favored sex in comparable positions.[3]

If the test is to be whether a "sex-plus" condition discriminates against some rather than all members of a sex, then, as was stated by Chief Judge Brown, dissenting below: "If 'sex-plus' stands, the Act is dead." (See App. to Petit. for Cert., p. 18a.) For, as Chief Judge Brown proceeded to point out, an employer intent upon discriminating need exert but limited imagination to devise a variety of non-business-justified standards which would effectively eliminate the vast bulk of females from prospective employment and thereby permit the employer to effectively circumvent the purposes of the Act.

Judge Brown's caveat is clearly dramatized by the history of "sex-plus" discriminations against female cabin attendants as contrasted to their male counterparts. They have been involuntarily retired by various air carriers upon (1) attainment of age 32 or 35; (2) marriage; and

3. The Respondent appears to have suggested this distinction to the Court of Appeals by a concession it made at p. 9 of its Brief: "It is of course possible that an otherwise valid employment standard could be used to discriminate in a manner prohibited by Title VII. For example, a company policy of refusing to hire anyone who lived more than three miles from the plant would not on its face violate Title VII, since the Act does not bar geographical discrimination as such. But if it were shown that only white workers lived within the three mile limit and that all the black population of the community was centered outside of that area, then quite possibly this otherwise innocuous discrimination would in fact be an invidious discrimination against race, which is prohibited by the Act."

(3) pregnancy; no corresponding terminations of employment have been exacted against the male employees.

The effective erosion of female employment opportunities, should such "sex-plus" criteria for discrimination be legitimatized, can be easily seen. By compelling retirement at an early age, an employer is forcing a female employee to leave the career for which she is trained, to forfeit seniority benefits and to seek training or employment in a new field, probably at reduced pay. In comparison, a male employee can continue his career until normal retirement.

Should the opportunity for marriage appear, the female employee is given a choice—no husband or no job. The male employee can marry as often as he wishes without prejudicing his job.

Should the female employee become pregnant, she loses her job. It is immaterial whether the conceived child is born alive; it is immaterial whether the female will be required to support her child; it is immaterial whether the female gives up the child for adoption. The male employee can father as many children as he will without prejudicing his job.

Since the purpose of the subject prohibition in the Act was to eliminate the double standard in employment based upon sex and to equalize employment opportunities for women, it is submitted that the very essence of the law will be subverted if the foregoing discriminations against female cabin attendants are to be sanctioned under the guise of a "sex-plus" test.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and remanded with appropriate instructions.

Respectfully submitted,

GILBERT FELDMAN,
BARBARA JANE HILLMAN,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Amicus Curiae.

SUPREME COURT, U. S.

FILED

MAY 16 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

May, 1970

Of Counsel:

CLARK C. VOGEL
New York, New York

JAMES T. ELLISON
Baltimore, Maryland

J. THOMAS CARDWELL
GEORGE T. EIDSON, JR.
DAVID J. FULLER
Orlando, Florida

ARNOLD & PORTER
Washington, D. C.

WILLIAM Y. AKERMAN
DONALD T. SENTERFITT
Suite 506
First National Bank Building
P. O. Box 231
Orlando, Florida 32802

PAUL A. PORTER
VICTOR H. KRAMER
DENNIS G. LYONS
JAMES A. DOBKIN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Respondent

INDEX

PAGE

Jurisdiction 1

Statement 2

Summary of Argument 10

Argument 13

A. As to the Timeliness of the Petition for Certiorari 13

B. As to the Merits 17

Conclusion 29

Table of Authorities

Cases:

Bowman v. Loperena, 311 U.S. 262 (1940) 16

Boylan v. United States, 257 U.S. 614 (1921) 14

Department of Banking v. Pink, 317 U.S. 264 (1942) 13

FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 15, 16

Market Street R. Co. v. Railroad Comm'n, 324 U.S. 548 (1945) 15

Teague v. Commissioner of Customs, 384 U.S. 977 (1969) 13

PAGE

United States v. Adams, 383 U.S. 39 (1966) 14
United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 14

Zimmern v. United States, 298 U.S. 167 (1936) 14

Rules:

Federal Rules of Appellate Procedure
Rule 35(c) 15
Rule 40(a) 13, 15
Rule 41(a) 1
Rule 41(b) 14

Statutes:

28 U.S.C. §1254(1) 2
28 U.S.C. §2101(c) 13
42 U.S.C. §2000e 3

Pub. L. 88-352, §706 et seq., 78 Stat. 259 (1964) 3

Civil Rights Act of 1964
Title VII, §703(a) 2, 4, 17, 19, 29

Other Authorities:

Stern and Gressman, *Supreme Court Practice* (4th ed. 1969), p. 242 ..... 13, 14, 15
Backenheimer, *Demographic and Job Characteristics as Variables in Absences for Illness*, 83 Public Health Reports, 1029 (1968) 29
Isambert-Jamati, *Absenteeism Among Women Workers in Industry*, LXXXV International Labour Review 248 (1962) 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

JURISDICTION

The judgment of the Court of Appeals was dated and entered May 26, 1969, and a certified copy thereof was issued as a mandate to the District Court on June 17, 1969, as required by Rule 41(a), Federal Rules of Appellate Procedure, no petition for rehearing having been then or thereafter filed. (A. 39a) On July 29, 1969, the Chief Deputy Clerk of the Court of Appeals sent a letter to counsel advising them that "Pending further order of the Court, the mandate heretofore issued is being recalled." The letter did not purport to amend or vacate the judgment previously entered. It also recited that "at the request of one of the members of the Court in active service" the parties were requested to file and exchange further briefs on the case. (A. 40a-41a)

On October 13, 1969, the Court of Appeals entered an order, *per curiam,* unanimously subscribed to by the original panel, to the effect that "The petition for rehearing is denied." (A. 42a) No petition for rehearing had in fact been filed. The order also recited that at the request of one of the members of the court, the circuit judges in regular active service had been polled and a majority were not in favor of a rehearing *en banc,* and that, accordingly, rehearing *en banc* was also denied. This aspect of the order was entered by a 10-to-3 vote, the three dissenters being judges who were not members of the original panel. (A. 42a) The petition for certiorari was filed on January 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This action was commenced by petitioner, Mrs. Ida Phillips, against respondent by a complaint filed in the District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964. The complaint charged respondent with "maintaining a policy, practice, custom or usage of discriminating against the plaintiff, and other female persons with pre-school age children similarly situated, because of sex. . . ." (A. 3a) The complaint charged that petitioner had submitted an application for employment as an assembly-trainee to respondent pursuant to an ad in the local newspaper which advertised positions for 100 assembly-trainees, but was told by a receptionist, when she gave her application in at the respondent's office, that respondent "was not considering applications from women with pre-school age children." (A. 3a-4a) The complaint recited certain administrative proceedings which had taken place before the Equal Em-

ployment Opportunity Commission ("EEOC"), and prayed for an injunction against interference with the rights of petitioner and "others similarly situated to enjoy equal employment, treatment, advancement or training for advancement as secured by Title VII. . . ."; for retroactive employment with back pay for petitioner; and for costs and attorney's fees. (A. 5a-6a)

Annexed to the complaint was a decision of the EEOC[1] dated July 14, 1967, (A. 8a-10a) which indicated that the original charge by petitioner made before the EEOC was as follows:

> "When she applied for a job with Respondent in response to a newspaper advertisement, the receptionist told her that her application could not be considered because Respondent was not hiring *people* with pre-school age children." (Emphasis supplied.)

The EEOC decision at another place stated that when petitioner "gave her application to the receptionist, she was told that Respondent was not considering applications from people with pre-school age children." The decision also recited that in the investigation before the EEOC, respondent stated that it did not have any formal rule "on applicants with pre-school age children" but that it "prefers not to hire women who have young children." (A. 9a)

The respondent filed a motion to dismiss the complaint and to strike certain of its allegations. (A. 13a) By order dated February 27, 1968, the court ordered that those

[1] Such a decision of the EEOC has no evidentiary effect in the subsequent court proceedings, under the statute (§706(a)), but the filing of charges with the EEOC is a prerequisite to an individual's right of action under the statute. §706(e). See §706, Pub. L. 88-352, 78 Stat. 259 (1964), 42 U.S.C. §2000e.

portions of the complaint "concerning the alleged denial of a right based upon the claim that the plaintiff was discriminated against because she has pre-school age children" should be stricken.[2] However, the court held that the allegations of violation of the Act based on discrimination because of sex would not be stricken. (A. 14a) Thereafter, respondent filed an answer which denied any discrimination on the basis of sex on the part of respondent, or that petitioner was refused employment solely on the basis of her sex. The answer did admit that plaintiff unsuccessfully applied for employment with respondent on the date she specified in her complaint, and that the receptionist told her that applications from women with preschool-age children were not being considered. (A. 16a-17a)

No further proceedings directly pertinent to the present issues were taken in the action until respondent filed a motion for summary judgment on May 31, 1968. The motion was supported by an affidavit of the head of the respondent's employment department at the location in question to the effect that respondent's policies required compliance with Title VII of the Act; that no discrimination with respect to sex in hiring was practiced; that between 70 to 75% of the applicants for assembly-trainees at the time in question were women; and that approximately 75 to 80% of all those actually hired as assembly-trainees at the time were women. (A. 18a-19a) These

[2] That order also ordered the portions of the complaint alleging the action to be a class-action to be stricken. (A. 14a) No appellate review has been sought in this Court with respect to this aspect of the court's order. The notice of appeal to the Court of Appeals included this issue (A. 29a), but the Statement of Issues filed as part of petitioner's brief in that court omitted it and the opinion of the Court of Appeals mentioned the fact that the allegation had been stricken (A. 31a) but made no further reference to it.

statistics were not disputed, and the record stands that the overwhelming proportion of applicants for the positions in question were women and that an even higher proportion of those hired were women.

While it is undisputed that respondent has no written policy, either at the corporate level or at the level of the plant in question, discouraging or even relating to the hiring of persons with preschool-age children, it is also undisputed on this record that the receptionist who took Mrs. Phillips' application said words to the effect that respondent was not considering applications from women with preschool-age children. The record does not contain any indication of precisely what it was that this low-level employee of respondent said to petitioner. The record is also completely silent as to whether whatever it was that the employee said would have been understood by people to whom the remark was addressed as excluding from consideration for employment women with preschool-age children who had a responsible adult living in their home during the day, such as a grandparent, unemployed spouse, unmarried or widowed sister, or the like.[3] The record is silent as to what would have been said to Mrs. Phillips if she had said she was in this category.

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[3] There is nothing in the record which even purports to be a direct quote from the receptionist. Even if we had a direct quote, presumably we could not interpret it in the same fashion as one would interpret a business contract or other commercial instrument. In popular speech, "women with preschool children" might mean what petitioner takes it to mean, namely, any woman who is the mother of children who are currently alive and at the preschool age. Or it might mean women who in the ordinary course of the day were left alone in their homes "with" preschool children, that is, mothers who had no relative living in their home with whom they could leave the children. Quite possibly because Mrs. Phillips was in the latter category, she did not pursue the matter further.

The record is, of course, also completely silent as to whether, if there were some exception under these circumstances, Mrs. Phillips would be in a position to have taken advantage of it. The record's only information as to Mrs. Phillips' domestic arrangements are that she has seven children, the youngest of which at the time of the action was a preschool-age child, all of whom have a different last name from hers;[4] perhaps the inference that conceivably could be drawn from this last fact is that she is the sole custodian of her children, although we do not suggest that such an inference can be drawn from this meager record. There is also no evidence of record as to what would have been respondent's attitude toward hiring a father with custody of preschool-age children, who was divorced, a widower, or the like, and living alone, and hence dependent upon outside baby-sitting arrangements, where there were other applicants, male or female, in sufficient numbers for the assembly-trainee positions, who did not have this domestic complication.[5]

In short, the record tells us nothing at all about Mrs. Phillips and her arrangements for the care of her seven children except the fact that she has seven children; nothing about the dimensions of respondent's attitude toward hiring people with custody of preschool-age children, outside of the statement made by the receptionist; and what it tells us about the respondent's hiring practices

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[4] This is found in her affidavit supporting her motion for leave to appeal *in forma pauperis* (A. 26a-27a) and was not before the District Court when it granted judgment.

[5] It is commonly supposed that there are substantially fewer men than women in this category. Although the record is perfectly silent on this point, this may have been the reason why (apart from the obvious fact that Mrs. Phillips was a woman and any statement as to men would, accordingly, have been irrelevant) the receptionist said that *women* with preschool-age children were not being considered for employment.

with respect to sex and assembly-trainees is that the overwhelming percentage of people hired are women—indeed, in a higher proportion than the proportion of women in the people applying.

Almost a month after the service of the respondent's motion for summary judgment, the petitioner served a request for the following admission upon respondent: "That the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees." (A. 21a) The District Court granted the motion for summary judgment before the time for responding to the request had run, and the request was, accordingly, never answered. However, we can advise this Court that, if answered, the answer would have been "yes," and that the answer would indeed have been "yes" had the word "females" appeared in the request in lieu of the word "males."

The District Court on July 9, 1968, granted the motion for summary judgment, observing that the respondent had, during the relevant period of time, hired 479 women for the job category for which the petitioner had applied; that 75 to 80% of the employees of the respondent holding the position were women; and that this percentage was higher than the percentage of women who applied. The court never found just what respondent's practices were with respect to the hiring of women (or men, for that matter) with custody of preschool-age children.* In

* The District Court assumed that the answer to the request for admission would have been affirmative. (A. 22a-23a) The court, however, found that this fact was irrelevant to the issue before it (A. 23a) as indeed it was when viewed in light of the time which would have any relevance for comparative purposes (September 6, 1966, contrasted with the time to which the request was directed —June 26, 1968). (A. 21a) The assumption that males with pre-school-age children were employed by respondent appears to have

its brief opinion, the court observed that: "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies." The court also held that the plaintiff had submitted no affidavits tending to show that she was discriminated against because she was a woman. Finding no genuine dispute of material fact, the court granted the motion for summary judgment. (A. 22a-23a) Because of this ruling, the court did not consider or reach the other defenses raised in respondent's answer, or those, such as the so-called "bona fide occupational qualification" defense, which it might have raised under the general issue at trial.

On petitioner's appeal, the Court of Appeals for the Fifth Circuit on May 26, 1969, affirmed, in an opinion by Circuit Judge Morgan in which Judge McGowan of the District of Columbia Circuit, sitting by designation, and Circuit Judge Gewin concurred. The court's opinion treated the case as presenting the general proposition of a differentiation "between men with pre-school age children, on the one hand, and women with pre-school age children, on the other." (A. 36a-37a) It then dealt with this general proposition in a rather general way. The court observed that it was possible to conclude that this sort of distinction constituted a prohibited discrimination, justifiable only under the "bona fide employment qualification" provision of the statute. However, it noted that the EEOC, which appeared *amicus* before the Court of Appeals, "has

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been thereafter treated by the petitioner and the Court of Appeals as tantamount to a finding that respondent would discriminate between men and women similarly situated with respect to custodial arrangements for their preschool-age children, which, of course, it is not. However, as will be developed later, the state of the record on this summary judgment motion does not affirmatively establish that respondent treated alike males and females having in fact similar custodial responsibilities.

rejected this possible reading of the statute." (A. 37a) The court stated that this left it "only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their preschool age children." The court observed that: "If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon 'sex' as Congress intended that term to be understood, we have no hesitation in choosing the latter." (A. 37a)

The court's opinion also contained a further general observation to the effect that "Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired." (A. 36a)

The Court of Appeals, on its own motion on July 29, 1969, recalled the mandate which had been on June 17, 1969 issued under its judgment entered May 26, 1969. A letter from the Chief Deputy Clerk of the court (A. 40a-41a) recited the request of one of the members of the court in active service that there be further briefing "with particular reference to the standard to be applied under the statute forbidding discrimination because of sex." (A. 40a)

On October 13, 1969, the court entered an order denying rehearing[1] and reciting that rehearing *en banc* was also

[1] The court's order recites that a *petition* for rehearing was denied. The brief for the United States as *amicus curiae* in this matter (Gov't Br. 1-2) also erroneously recites that a "timely petition for rehearing" was filed and denied. The brief for petitioner makes no such assertion, though it does unexplainedly refer to a "timely request for rehearing" by a member of the court. (Pet. Br. 2) No petition for rehearing was ever filed, as indeed footnote 1 to Chief Judge Brown's opinion in the Court of Appeals, dissenting from the court's denial of rehearing *en banc*, makes plain. (A. 43a)

denied, the latter by a 10-to-3 vote of the judges in active service. Chief Judge Brown filed a dissent, in which two other judges concurred, from this action. The dissent particularly focused on, and took issue with, the general expressions by the original panel to the effect that the "coalescence of . . . two elements", one a factor prohibited by the statute and the other a nonprohibited factor, was sufficient to justify the respondent's denial of employment to the petitioner.

This Court granted certiorari on a petition which framed the sole question presented as "Whether the sex discrimination prohibition of § 703, Civil Rights Act of 1964, is violated by refusal to hire all women with preschool children while hiring men of the same class, where the distinction does not purport to be based on a bona fide occupational qualification."

SUMMARY OF ARGUMENT

A. The petition for certiorari was not filed within the time provided by law and accordingly the writ of certiorari should be dismissed. The petition was not filed within 90 days of the judgment entered on May 26, 1969, but rather, more than seven months thereafter. No petition for rehearing or motion to amend the judgment was filed, and neither the Court of Appeals' order of October 13, 1969, nor the letter from the Chief Deputy Clerk which preceded it, operated to toll the time for petitioning for certiorari or to establish a fresh date from which to petition for certiorari.

B. 1. The sole question on the merits before this Court is the question whether the District Court erred in granting respondent's motion for summary judgment on the

record as it then stood. That record, although perhaps abbreviated in content, presented no material issue of fact on petitioner's claim of discrimination. Petitioner's general allegation of such discrimination had been rebutted by respondent's affidavit to which no counteraffidavit was filed. Petitioner's allegation that a receptionist told her that respondent was not considering applications for women with preschool-age children standing alone, and even taken as true, does not state a claim under the Civil Rights Act, unless it is coupled with a comparison of respondent's treatment of males with preschool-age children at the relevant time. Petitioner's election not to adduce any proofs concerning respondent's treatment of such males at the relevant time resulted in a situation where there was presented no issue of material fact for resolution by the District Court to preclude summary judgment for respondent.

2. The briefs of petitioner and the various *amici* range broadly over the practice, apparently not uncommon in industry, of considering as a negative factor in employing job applicants, the fact that they are directly responsible for the supervision of preschool children. These briefs discuss a range of practices or possible practices which are not presented by the truncated record in this case. Many of the abstract positions taken appear to be without justification in terms of the statute.

3. The generality of the assertions by the petitioner and *amici* as to what is and is not permissible in this area are the consequence of the state of the record in this case. The record is silent as to what would have been respondent's attitude had Mrs. Phillips volunteered that she had other custodial arrangements for her preschool-age

children, or conversely, what attitude the respondent would have taken toward a male applicant who was also subject to a custodial problem similar to that of a woman applicant.

4. This case comes before the Court as a result of the grant of respondent's motion for summary judgment, the granting of which motion precluded the development of a more adequate record. The interpretation of this minimal record by petitioner and the *amici*—and apparently by the Court of Appeals—leads us to the conclusion that the summary disposition of the case upon our motion—although defensible—may have contributed to the possible distortion of the principles governing discrimination by reason of sex. If that is so, we recognize that the importance of avoiding erroneous interpretations of the significant principles of the Act might prompt this Court to conclude that it must reverse the judgment of the Court of Appeals, set aside the grant of summary judgment by the District Court, and remand the case for further proceedings, so that the record might reflect with appropriate particularity the employment practices of respondent in all relevant respects, on which a determination could be made as to whether they violated the Act.

ARGUMENT

A. *As to the Timeliness of the Petition for Certiorari*

The petition for certiorari in this matter was not filed within the time provided by law. Since the period for petitioning for certiorari from a civil judgment of the Court of Appeals is governed by statute, 28 U.S.C. §2101(c), the failure to petition within the time prescribed is jurisdictional and the writ of certiorari should be dismissed for want of jurisdiction.[1] See *Teague* v. *Commissioner of Customs*, 394 U.S. 977 (1969); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); Stern and Gressman, *Supreme Court Practice* (4th ed. 1969), p. 242.

The petition for certiorari in this case was filed on January 10, 1970, over seven months after the entry of judgment on May 26, 1969, and would be clearly untimely unless the Court of Appeals' order of October 13, 1969, set the 90-day period for petitioning for certiorari running once again. We submit that it did not. No petition for rehearing was filed, either within the 14 days contemplated by Rule 40(a), Federal Rules of Appellate Procedure, or otherwise. Accordingly, the established doctrine that the filing of a timely petition for rehearing tolls the time for petitioning for certiorari until the order disposing of the petition is entered (see *Department of Banking* v. *Pink*, *supra*, 317 U.S., at 266) is not applicable. Nor was there any other motion filed by any of the parties, such as a motion to amend the judgment, of a nature which would have a similar effect upon the original judgment. See

[1] Accordingly, although respondent did not raise this point in opposing certiorari, it may be raised and considered by this Court at this time.

United States v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *United States* v. *Adams*, 383 U.S. 39, 41 (1966).

The only action that was taken here was an action taken by the court itself. That action is expressed solely in the Chief Deputy Clerk's letter of July 29, 1969, and in the court's order of October 13, 1969. The Chief Deputy Clerk's letter advised that the court had recalled its mandate to the District Court. But it is hornbook law that it is the date of entry of the judgment, not the date of transmittal of the mandate or any judgment entered on it, that is determinative of the time for petitioning for certiorari. See *Boylan* v. *United States*, 257 U.S. 614 (1921); Stern and Gressman, *supra*, at 246. Indeed, this is underscored by Rule 41(b), Federal Rules of Appellate Procedure, which provides for a stay of the court of appeals' mandate pending application for certiorari. If the stay of the court's mandate prevented its judgment from being final, such a stay would also operate to extend the time for petitioning for certiorari, which is manifestly not so.

The only other effect of the Chief Deputy Clerk's letter was to advise that at the request of one of the members of the court in active service, the parties were requested to brief the case further. Neither the letter nor any order of the Court of Appeals ever purported to vacate the judgment or to announce that the court proposed to amend or modify its judgment. The letter was not the equivalent of an order by the court that the case be reheard. Thus, the case does not fall within the exception established by the doctrine of *Zimmern* v. *United States*, 298 U.S. 167 (1936), which holds that the time for review runs afresh when a court, on its own motion, actually opens up its judgment. Here, the judgment was never vacated, amended, or otherwise opened up; no petition for rehearing was ever filed;

and the only order ever entered by the Court of Appeals after the entry of its judgment was one refusing rehearing on that judgment.[2]

Indeed, it appears that the only rehearing requested was simply pursuant to an internal request made by a member of the court who was not on the panel which sat to decide the case. The Federal Rules of Appellate Procedure, promulgated by this Court, expressly provide that even the pendency of a suggestion for rehearing *en banc* made by a party "shall not affect the finality of the judgment of the court of appeals. . . ." Rule 35(c). If a suggestion made by a party, through the filing of a formal document entered in the court of appeals' docket, does not affect the finality of the judgment entered, and hence extend the time for petitioning for certiorari, so much the less would an informal request made internally in the court of appeals by a member of the court who was not on the panel.[3] This is, of course, particularly the case where the internal "suggestion" for rehearing *en banc* was denied and the judgment never opened up or revised.

The case presented, then, is one which is within the doctrine of *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 209-12 (1952). That case teaches where there has been no petition for rehearing or motion to amend filed by a party, it is only where the court "changes matters of substance, or resolves a genuine ambiguity, in a judgment

[2] To be sure, the judgment may at the relevant times have been within the power of the court, *sua sponte*, to revise it; but the existence of that power does not detract from finality. *Market Street R. Co.* v. *Railroad Comm'n*, 324 U.S. 548, 550-52 (1945); Stern and Gressman, *supra*, at 248-50.

[3] It appears relevant, too, that even that internal "suggestion" was made well after the time had expired for petitioning for rehearing or suggesting rehearing *en banc*. Rules 35(c), 40(a), Federal Rules of Appellate Procedure.

previously rendered" that the time to petition for certiorari runs afresh. 344 U.S., at 211. In cases where there is no petition for rehearing or motion to amend the judgment, but simply an order of the court of appeals subsequent to the entry of its judgment, this Court in the *Honeywell* case held that: "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." 344 U.S., at 212. Here, it is clear that the October 13, 1969, order did not disturb or revise the prior judgment; it denied any further hearing with respect to it. That judgment was never the subject of a timely petition for rehearing or motion to amend, and it was never vacated by the Court of Appeals. Nor was there ever even a motion for leave to file an untimely petition for rehearing. See *Bowman* v. *Loperena,* 311 U.S. 262, 266 (1940).

The time for petitioning for certiorari, then, ran from the May 26, 1969, judgment. The petition for certiorari was thus out of time, and the writ of certiorari should be dismissed. A contrary conclusion would disturb the finality of judgments and open up the possibility of extension of the time for petitioning for certiorari in this Court by action of a minority of a court of appeals, which did not even participate in the panel deciding the case, in cases where the parties have not sought rehearing or amendment of the judgment and where the whole court, including the panel which decided the case, does not vacate or amend its judgment. Such a conclusion would be not only unfortunate from the standpoint of judicial administration and the prompt disposition of cases, but would appear to raise a conflict with the statutory provisions that permit only Justices of this Court to extend the time for petitioning for certiorari.

B. *As to the Merits*

1. Underlying all the material in all the briefs for petitioner and the several *amici* supporting her is the question whether the District Court erred when it granted respondent's motion for summary judgment. (A. 22a-23a) It is therefore essential to review the framework of the record in which the District Court's summary judgment order was entered.

In her complaint (A. 2a-6a) the petitioner undertook to charge the respondent with a violation of her rights under Title VII of the Act. She asserted that "When she gave her application to the receptionist, she was told that defendant was not considering applications from women with pre-school age children." Petitioner then made the general, conclusionary charge that: "Defendant refused to employ plaintiff solely on account of her sex." (A. 4a) Petitioner attached to her complaint a copy of the decision of the EEOC (A. 8a-10a) which makes the statements quoted at page 3 of this brief.

In response to the complaint, respondent filed several motions, among them a motion to dismiss for failure to state a claim upon which relief could be granted. (A. 13a) While it did not grant the motion to dismiss as such, the District Court did strike certain portions of the complaint. (A. 14a-15a) The District Court expressly struck the allegations based on a refusal to hire petitioner because she had preschool-age children. In so doing the District Court asserted (A. 14a):

> ". . . it being the holding of this Court that discrimination based upon an applicant [a word encompassing both males and females] having pre-school age children is not a discrimination based upon sex in viola-

> tion of the Civil Rights Act. However, the allegation alleging a violation of the Civil Rights Act based solely on discrimination because of sex remains unstricken. . . ."

It is apparent from the foregoing that the District Court understood that the refusal to hire *an applicant* because of preschool-age children did not violate the Act. It is, of course, not seriously disputed that, if such an employment standard is not applied discriminatorily, this is a proper interpretation of the statute. It therefore seems apparent that the order of the District Court did not strike or eliminate from the petitioner's complaint her charge that she, individually, was discriminated against because she was a woman with preschool-age children.

The motion for summary judgment was heard on July 8, 1968. (A. 22a) Prior thereto, on June 26, 1968, petitioner served a single request for admission: "That the Martin Marietta Corporation *now* employs males with preschool age children in the position of Assembly Trainees?" (emphasis supplied). (A. 21a) At the time of the hearing, the time for responding to the request for admission had not expired.

It was this record, therefore, that the District Court had before it at the hearing on the motion for summary judgment. It is only in retrospect that the order entered at that hearing can be viewed in the light of statistics and assertions not found in the record which have subsequently been raised in the briefs.

When the District Court was called upon to rule, it was presented with a record which contained two issues. One was the issue raised by the general allegation that petitioner had been discriminated against because of her sex.

The other was the issue arising out of the charge that petitioner had been discriminated against on September 6, 1966, because she was a woman with preschool-age children.

There was no evidence in the record of any act of discrimination by the respondent, the closest thing to it being petitioner's allegation that the receptionist had told her the respondent was not considering applications from women with preschool-age children. To rebut any inference that there might be some policy of discouraging female employment, respondent submitted an affidavit reflecting its apparent preference for women at the time in question for the position aspired to by petitioner. (A. 19a-20a) The petitioner elected not to present any counter-affidavits—if indeed she could have—that respondent had acted in a discriminatory fashion.

It would appear, therefore, that the case reduced itself on summary judgment to whether there was any issue of material fact raised in the record by the allegation of what petitioner was told by respondent's receptionist. That allegation (A. 4a) standing by itself, and even taken as true for the purposes of the motion, does not state a claim within the meaning of Section 703(a). Standing alone, the fact that an employer declines to offer employment to women with preschool-age children does not constitute a violation of the Act, and to be such, must necessarily be coupled with a comparison of the treatment of males with preschoolage children at the relevant time. In this connection, it will be recalled that this is a refusal-to-hire case, and the relevant time would be the time at which the applicant applied for employment—in this case, September 6, 1966. (A. 3a) A request that respondent admit, on June 26, 1968, that respondent "now" employs

males with preschool-age children in the position of assembly-trainee (A. 21a), even if answered in the affirmative, would have no relevance to the petitioner's case.

It is submitted, therefore, that on this view of the record, the District Court was correct in granting the motion for summary judgment.

2. From the material submitted in the briefs for the petitioner and the various *amici*—which, understandably in the light of the skimpy nature of the record in this case, rely almost exclusively on extra-record materials in this respect—it appears that there is a fairly widespread practice in industry—particularly, assembly types of manufacturing industry where employee absence poses particular problems—of considering as a negative factor in employing job applicants the fact that they are directly responsible for the supervision of small children too young to attend school.

Presumably people having custody of small children would not apply for work at all unless they had the prospect of making some arrangements either with their spouse or other relative in the home, or with a baby-sitter in or outside the home, or with a day-care center, to take care of their children. But it appears that certain employers think that at least certain sorts of these arrangements have a way of breaking down (or that they cannot provide custody where the child becomes sick or is too ill to leave the house or to be mixed in with other children); that this is particularly so where employees must work different shifts in different weeks; and that accordingly certain sorts of these custodial arrangements expose a person having custody of small children to a substantial risk of absenteeism or other work interruption. Presumably this belief leads to the practice of considering

custody of small children as a negative factor in hiring. This practice, we may assume, takes different shapes and forms, and some of these forms may well pose problems under the provisions of the Civil Rights Act of 1964 which prohibits discrimination in employment by reason of sex. The briefs of petitioner and of the *amici* range rather broadly and generally over the question of the way in which recognition of the factor of custody of a preschool-age child may be considered, consistent with that Act.

Thus, the brief for petitioner at one point (Pet. Br. 9) appears to assert that even a discrimination against all married people, of either sex, on the one hand, as opposed to single people, on the other, or against all people with children, on the one hand, in favor of people without children on the other, is justifiable under the Act only where business interests are shown to require the same. This view we suppose to be erroneous inasmuch as the Act does not purport to protect a particular marital or parental status against unequal treatment in employment at all. In another place (Pet. Br. 12), the petitioner appears to make a contention to the effect that an employment rule which discriminated against any parent who was sole parental custodian of a preschool child, whether that custodian is a man or woman, would be violative of the Act because it would tend *in practice* to restrict "employment opportunities for those groups of women who most need jobs because of economic necessity," presumably, because as a practical matter it would mainly affect them. Whatever the economics of the matter, that such a rule would be impermissible under the statute is far from evident.

At a further point in her brief, petitioner makes the suggestion that the "primary adverse impact [of any rule tending to restrict employment of parental custodians of

preschool-age children] is on blacks." (Pet. Br. 13) Further economic material outside of the record is introduced in the brief at this point in support of this proposition. We should observe that there is no evidence whatsoever, nor was there any charge in the complaint, that respondent engages in racial discrimination. Indeed, petitioner carefully refrains from suggesting that she is black herself and the record shows she is not (Tr. of Hearing on Defendant's Motion to Strike, p. 25; unprinted record p. 200).[1]

Again, the briefs of the *amici* address themselves to practices and issues not presented by the record. Thus, the brief of "Human Rights for Women, Inc." (H.R. Br. 9-10) essays an elaborate model of what sort of rule or practice in this area might be consistent with the Act. It suggests that there would have to be a rule which was not only neutral on its face, that is, applicable to all single (including divorced and widowed) parents of preschool-age children regardless of sex, but also neutral in its operation. A rule, according to this *amicus,* would not be neutral in its operation if more women than men were affected by it, *i.e.,* if more women than men were sole parental custodians of preschool-age children. Of course, since everyone knows that this is so, there could not be any employer consideration whatsoever of custody of preschool-age children under the Act, and the fact that, as here, a very high percentage of the women applying were employed for the categories

[1] Perhaps in an effort to introduce the same extraneous factor into this case, the brief for the United States makes an argument based on the following premise: "An employer's refusal to hire otherwise qualified Negroes with pre-school age children, while hiring whites with such children, is obviously proscribed." (Gov't Br. 13) We do not understand the relevancy of this assertion to this case at all. If it is an attempt to assert that no differences may be recognized between the sexes that are not recognized between the races under the Act, we would suggest that it contravenes the legislative history of the Act as well as common experience.

in question would not be relevant to refute the inference of discrimination. We see no basis for the conclusion that the abstract position suggested by this *amicus* is correct.

In a similar category may be placed the apparent suggestion by the United States that an employer should not be permitted to draw a distinction, neutral as to sex, between parents with custody of preschool-age children who have other responsible adults resident in the house, on the one hand, and those who have to rely upon day-care centers, on the other. (Gov't Br. 5) Once again, there is nothing in the Act about discrimination in hiring as between parents who have other adults resident in their households to take care of preschool-age children and those who must make other arrangements, and accordingly, it is hard to square this position with the text of the Act.

3. The generality of the assertions by the petitioner and *amici* of what is or is not permissible in the area of the extent to which an employer may recognize the factor of custody of preschool-age children, as well as the rather general and abstract discussion in the opinion of the Court of Appeals, is, we regret to say, apparently the consequence of the present state of the record. For that state, respondent's motion for summary judgment was, we admit, primarily responsible. That state is simply that a receptionist told petitioner that "women with pre-school age children" were not being considered for employment. The affidavit in support of respondent's motion for summary judgment, the answers of respondent to petitioner's interrogatories and this conclusionary sentence are the only evidence in the record of what respondent's policy is.[2] To

[2] There is no direct evidence dealing specifically with respondent's policy as to hiring men with custodial problems caused by preschool-age children.

be sure, as a practical matter, whatever may be the technical state of the record, the receptionist's remark cannot and should not be considered as equivalent to a written, formal, inflexible company policy that no woman with a living preschool-age child would be employed as an assembly-trainee. We do not have direct evidence in the record to show with specificity what the response of the receptionist—or of a more responsible level in the company, if the matter had been pursued—would have been if Mrs. Phillips had said one of the following things:

a. "While I have a preschool-age child, I am divorced and custody of that child was awarded to my husband."

b. "While I have a preschool-age child, my husband is disabled and spends his time at home but is capable of taking care of the child during my shift and does so."

c. "While I have custody of a preschool-age child, my husband is unemployed at home and takes care of the child during my shift."

d. "While I have custody of a preschool-age child, and while I am divorced (or while my husband works during my shift), my widowed mother lives with me (us) and takes care of the child."

In any of these cases, for all we know, the receptionist might have answered "That is different"; or that conclusion might have been reached after she checked the matter out. Of course, we also do not know on the present record whether Mrs. Phillips was in a position to make any of those statements.

Again, the petitioner, the *amici* and the Court of Appeals have treated the present state of the record as technically standing that, simply, men with preschool-age children were not disqualified from being employed as assembly-trainees. However, we question whether as a practical matter any court should assume that if it became evident during the employment interview that a male employee—for example, a widower—had sole custody of small children living alone with him, so that he would be missing from the assembly line if his outside baby-sitting arrangements broke down, such an applicant would be blithely hired by respondent while it was disqualifying women under similar circumstances. It would take an affirmative prejudice, in the classic sense, against women for an employer to do that. The very high percentage of women actually hired for the job in question—which indeed appears to be a sort of small-part assembly job that women are commonly supposed to excel at—indicates that as a practical matter no such prejudice exists, and that a discrimination in favor of the male applicant in the case put would not have been practiced.

4. The fact of the matter is, however, that the present record affords no real basis, by way of evidence bearing directly on those points, for determining what in fact would have been the respondent's reaction under any of the cases we have put. And the record has been left without direct evidence as to whether respondent would ever consider a father's custodial problems with respect to preschool-age children as a negative factor in hiring. To be sure, these deficiencies in the record are in substantial part due to the grant of the motion which respondent itself made for summary judgment—although petitioner herself developed no details about these matters, or, indeed, about

her own status, presumably preferring to have the state of the record left on a *per se* basis.

As this case comes before this Court on review of the grant of summary judgment, it is made to appear by the petitioner and the *amici*—particularly in light of some of the language of the Court of Appeals in its opinion—that, as a technical matter, respondent had an inflexible policy:

A. that women with preschool-age children would not be employed *at all*, notwithstanding the circumstances—that is, even if the woman did not have custody of the children, or if she did, even if there was a responsible adult, including her husband, resident in the household and at home during the day to take care of the children; and

B. that no man with a preschool-age child, however great the custodial problems that child imposed on him (as, for example, in the widower case above), would be disqualified or adversely rated in hiring on that account.

We must agree that such a practice would constitute a discrimination based on sex which would be prohibited by the Act.[3] The present record, because of the summary nature of the proceedings in the District Court, appears to have invited the conclusion that it presents that rather technical issue. But because of the somewhat abstract nature of the record as developed, including the absence

[3] Unless justified under the "bona fide occupational qualification" provision. Because of the grant of summary judgment on the issue whether there was discrimination presented, respondent has never been required to put forth its proof on "bona fide occupational qualification," but if a discrimination is shown on remand, it should have the right to do so if it so elects. (See pp. 28-29, *infra*.)

of any specific information as to what exceptions would be made to the attitude expressed by the receptionist, as to under what circumstances a disqualification of fathers with custody would have been imposed, and as to the relevance of Mrs. Phillips' own domestic condition to whatever exact shape the respondent's policy would appear to have upon a full examination, it affords no real basis for examining any other question as to the permissibility of the consideration of the factor of custody of young children in employment under the Act.

To be sure, respondent defended the judgment before the Court of Appeals and prevailed there. But the highly general theory of the Court of Appeals, which may have been induced by the meager facts of record, may not be capable of defense in a number of the instances postulated by the petitioner and the *amici*. Our further review of the record in this matter leads us to the conclusion that the disposition of the case by summary proceedings in the District Court, at our instance and upon our motion —although defensible—may have created a basis for confusion—and perhaps even distortion—of the important principles of the provisions of the Civil Rights Act of 1964, which prohibits discrimination in employment by reason of sex. Indeed, as illustrated by the briefs of the petitioner and her *amici*, some portions of the opinion of the Court of Appeals may be subject to the construction that the law permits women and men exactly similarly situated with respect to problems arising out of the custody of small children to be treated differently, which we concede the law does not permit.

Accordingly, if this Court should conclude that grant of summary judgment, on our motion, by the District Court on the meager record before it, has given rise to

improper inferences as to the meaning and construction of the provisions of the Act prohibiting discrimination in employment on the basis of sex, this Court might then conclude that to avoid confusion and misconstruction of the important principles involved in the Act, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court to vacate its judgment and order entered July 9, 1968, and for further proceedings to cause the record to reflect precisely and with appropriate particularity what the hiring practices and policies of respondent were in all relevant respects, and whether they violated the Act. We would assume that it would be open on such a remand for respondent to undertake to show—if appropriate under the circumstances—that its acts complained of were based upon a reasonable business necessity. We would assume that it would also be open for respondent to show, if it can, that if its actual practice did amount to a discrimination on account of sex, that discrimination—that is, any precise way in which its policy as to parents having custody of small children differed as between mothers, on the one hand, and fathers, on the other—was based upon a bona fide occupational qualification, that is, a reason justifiable in business terms for the specific difference in treatment,[4] and that it would not be prejudiced in this respect by the

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[4] Pertinent to any such defense would be reference and statistical material such as the Public Health Service's analysis of data that women with children are more likely to have a higher frequency of absences:

> "This observation supports the contention that women's commitment to the family constellation results in higher frequencies of absence. Mothers are, at least theoretically, more often faced with role conflict than are women without children.

fact that it does not assert that there is any bona fide occupational qualification to exclude women as such from the position in question.[5]

CONCLUSION

For the reasons stated, the petition for certiorari was not filed within the time provided by law and the writ of certiorari should be dismissed. Should the Court disagree with this conclusion and reach the merits, respondent recognizes the importance of the principles of law raised by petitioner, the various *amici* and the Court of Appeals relating to the proper scope of Title VII, and recognizes that it is important that they not be confused or misinterpreted. However, respondent submits that this case presents a narrow issue on a limited record which neither requires nor provides an appropriate background for the decision of the issues tendered by petitioner and the *amici*. For the reasons stated, therefore, we respectfully submit that the grant of summary judgment by the District Court,

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Thus the roles of worker and mother come into conflict, and the result is the dominance of the mother role with the worker role supported by recourse to absence behavior." Backenheimer, *Demographic and Job Characteristics as Variables in Absences for Illness*, appearing in 83 Public Health Reports (Public Health Service, Department of Health, Education and Welfare) 1029, 1031 (1968).

A similar increase in absenteeism among women with small children has been reported in other countries. See, *e.g.*, Isambert-Jamati, *Absenteeism Among Women Workers in Industry*, LXXXV International Labour Review 248, 252 (1962).

[5] As, indeed, it could not and does not, since approximately 80% of the employees in the category are women.

on the record before it, was correct and that the judgment of the Court of Appeals which upheld it should be affirmed.

Respectfully submitted,

WILLIAM Y. AKERMAN
DONALD T. SENTERFITT
Suite 506
First National Bank Building
P. O. Box 231
Orlando, Florida 32802

PAUL A. PORTER
VICTOR H. KRAMER
DENNIS G. LYONS
JAMES A. DOBKIN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Respondent

Of Counsel:

CLARK C. VOGEL
New York, New York

JAMES T. ELLISON
Baltimore, Maryland

J. THOMAS CARDWELL
GEORGE T. EIDSON, JR.
DAVID J. FULLER
Orlando, Florida

ARNOLD & PORTER
Washington, D. C.

May, 1970

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

GEORGE COOPER
CHRISTOPHER CLANCY
PETER NUSSBAUM
401 West 117th Street
New York, New York 10026

Attorneys for Petitioner

INDEX

PAGE

ARGUMENT

A. The Timeliness of the Petition for Certiorari 1

B. Other Issues Raised by Respondent 6

CONCLUSION 10

AUTHORITIES

Cases

Bowman v. Luperena, 311 U.S. 262 (1940) 4

Department of Banking v. Pink, 317 U.S. 264 (1942) 3, 4

F.T.C. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1954) 5

United States v. Adams, 383 U.S. 39 (1966) 4

United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 4

United States v. Healy, 376 U.S. 75 (1964) 3, 4

Statutes

28 U.S.C. § 2101(c) 1

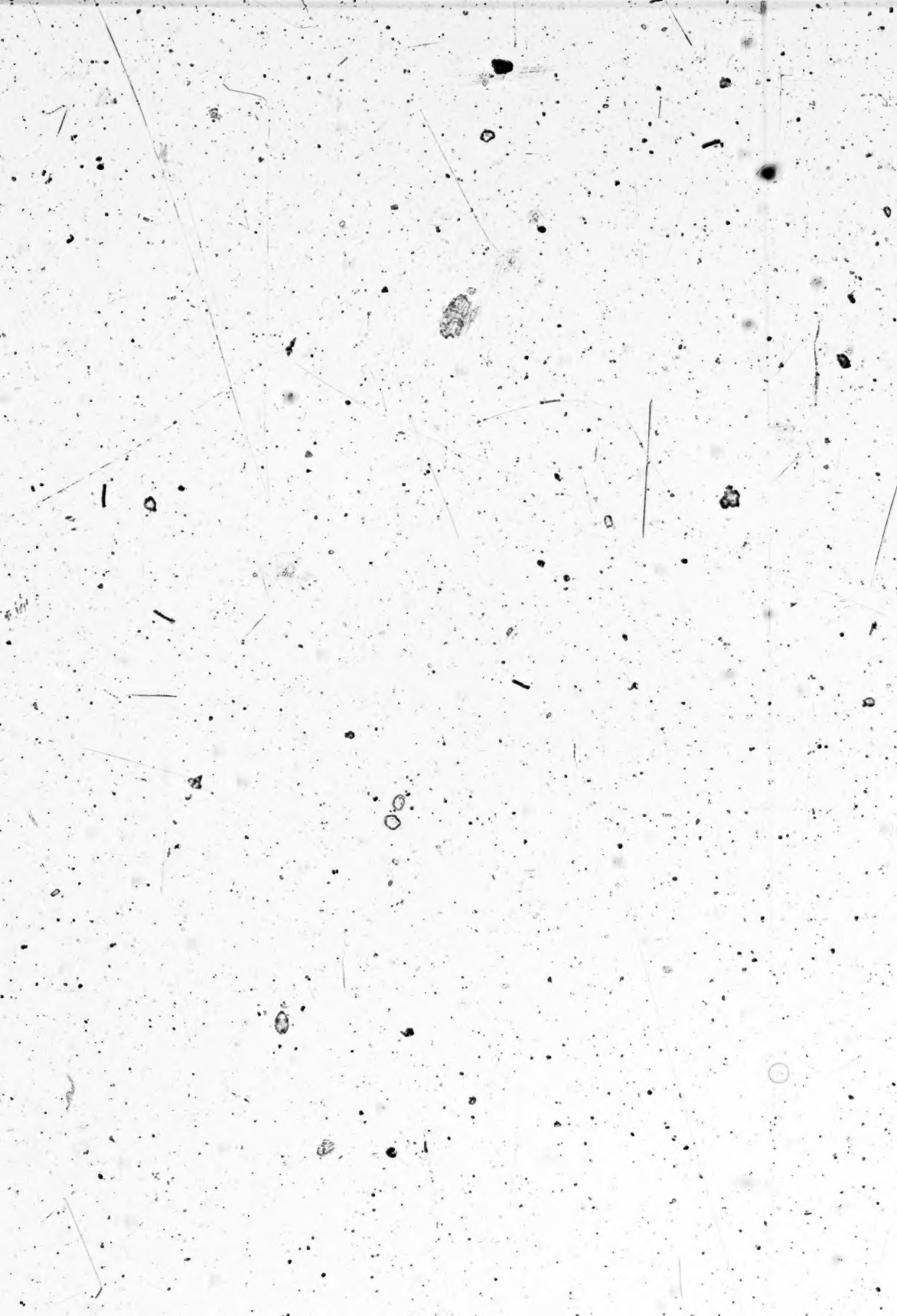
§ 703, Civil Rights Act of 1964 ..... 6, 10

Other

Rule 12, Local Fifth Circuit Rules 5

Rule 24(4), Rules of the Supreme Court 1

Stern & Gressman, *Supreme Court Practice* (4th ed. 1969) 3, 4



IN THE

Supreme Court of the United States

October Term, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

Pursuant to Rule 24(4) of the Rules of the Supreme Court, Petitioner submits this reply brief addressed to certain arguments that are raised for the first time in Respondent's brief.

A. *The Timeliness of the Petition for Certiorari.*

Respondent contends that the petition for certiorari was not filed on time. This contention is wholly without merit. The period for petitioning for certiorari from a civil judgment of a United States Court of Appeals is governed by 28 U.S.C. § 2101(c) which provides in part that:

> Any . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

The judgment in the present case was entered on May 26, 1969 (A. 39a). On July 29, 1969 (well before the deadline for applying for a writ of certiorari), the Clerk of the Fifth Circuit sent a letter to all counsel stating that the mandate was being recalled, and that at the request of one of the active judges on the Court the parties were requested to file briefs "with respect to the issues decided in the Court's opinion of May 26, 1969 with particular reference to the standard to be applied under the statute forbidding discrimination because of sex." (A. 40a-41a) In response to this request, Petitioner filed a Supplemental Brief on August 15, 1969 and Respondent filed its Supplemental Brief on August 18, 1969, both within the deadline for a certiorari petition.

On October 13, 1969 (more than 90 days after the entry of judgment), the Court of Appeals in a *per curiam* opinion stated:

> The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), Rehearing *En Banc* is also denied. (A. 42a-43a).

Chief Judge Brown, together with Judges Ainsworth and Simpson, dissented from the Court's failure to grant the rehearing *en banc* and filed an opinion that took issue with the Court's disposition of the substantive issues involved

in the case (A. 43a-52a). The mandate was re-issued on December 11, 1969 (A. 39a).

Petitioner filed her petition for certiorari on January 10, 1970, less than 90 days after the Fifth Circuit's *per curiam* opinion denying a rehearing *en banc*. Respondent's brief in opposition never suggested that the petition was untimely, and on March 2, 1970 this Court granted a writ of certiorari (A. 55a). Petitioner then filed her brief, and Respondent replied in a brief that contended for the first time that the petition for the writ had not been filed on time. Respondent argues that the 90-day period for filing the petition ran from the entry of judgment by the Court of Appeals on May 26, 1969, rather than from the Court's order denying a rehearing on October 13, 1969. This position, however, is contradicted both by prior decisions of this Court and by common sense.

It is well established that:

> "A timely petition for rehearing tolls the running of the three months period because it operates to suspend the *finality* of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942) (emphasis added).[1]

In both civil and criminal cases, the time to file a petition for certiorari runs from the denial of a timely petition for rehearing. See *United States* v. *Healy*, 376 U.S. 75, 78 (1964); Stern & Gressman, *Supreme Court Practice* 248

[1] At the time of the *Pink* decision, the period for petitioning for certiorari was 2 months from the entry of judgment in the court below. When the Judicial Code was revised in 1948, this period was changed to the present 90 days.

(4th ed. 1969). A timely motion to amend the judgment also tolls the time to apply for certiorari, *United States* v. *Adams*, 383 U.S. 39, 41 n. 1 (1966); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Stern & Gressman, supra* at 249-50; and even in the case of an *untimely* petition for rehearing, "where the court allows the filing [of such petition] and, after considering the merits denies the petition, the judgment of the court as originally entered does not become *final* until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Luperena*, 311 U.S. 262, 266 (1940) (emphasis added).[2]

The cases above stand for the proposition that the period for petitioning for certiorari must be postponed until the judgment of the court below becomes *final*.[3] Where a timely petition for rehearing is filed with the Court of Appeals, or an untimely petition is allowed, the judgment cannot be considered sufficiently final because of the possibility that it will be modified or reversed, thus altering the issues to be presented to this Court, and/or switching the roles of the parties on appeal. With this possibility, "It would be senseless for [the Supreme Court] to pass on an issue while a motion for rehearing is pending below. . . ." *United States* v. *Healy, supra*, 376 U.S. at 80; and it would be equally senseless to require a party to petition for certiorari.

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[2] A petition for rehearing tolls the time for applying for certiorari only if that petition is filed within the time allowed to apply for certiorari. See *Conboy* v. *First Nat'l Bank of Jersey City*, 203 U.S. 141, 145 (1906); *Stern & Gressman, supra* at 249.

[3] "[T]he object of the statute [establishing the period for petitioning for certiorari] is to limit the applicant's time to [90 days] from the date when the *finality* of the judgment for purposes of review is established." *Department of Banking* v. *Pink, supra*, 317 U.S. at 268 (emphasis added).

Respondent's brief attempts to distinguish the cases referred to above[4] from the present one by arguing that the rule they establish does not apply when the request for rehearing is initiated by the court itself, as in this case. Respondent implies that such an internal request does not rise to the level of a true request for rehearing. However, Local Fifth Circuit Rule 12 provides:

> *En Banc*
>
> A suggestion for a hearing or a rehearing en banc may be made as provided in Rule 35 of the Federal Rules of Appellate Procedure *or by any judge of the Court in active service on his own motion.* (Emphasis added.)

Thus, an internal request is a fully sanctioned mode of initiating a rehearing. Therefore, the rule extending the time for filing a certiorari petition should apply with equal strength whether it is a party to the action or the Court itself that initiates the request for rehearing. In either case, the request prevents the judgment of the Court of Appeals from being *final* because the Court retains the power to grant a rehearing and modify or reverse its original judgment. While the request for rehearing is pending, the parties should not be required to petition for certiorari since they cannot be certain of the precise issues

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[4] Respondent also relies on *F.T.C. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1954). This reliance is misplaced, however, since that case did not deal with a request for rehearing (344 U.S. at 210), but rather involved a motion that could only have "prompted the court below to take some further action which [would have] had no effect on the merits of the decision that we are now asked to review in the petition for certiorari." 344 U.S. at 211. In those circumstances, this Court refused to allow the filing of that motion to enlarge the time for petitioning for certiorari. In the present case, by contrast, the request for rehearing was aimed at a reversal *on the merits* of the decision now before this Court.

they will wish to appeal; in fact, the parties cannot even be certain as to which of them will ultimately be the petitioner before this Court.[5]

B. *Other Issues Raised by Respondent.*

Section B of the Respondent's brief is denominated "As to the Merits." This title would seem to indicate a discussion of the substantive issue raised by the petition for certiorari—viz., Whether the sex discrimination prohibition of § 703(a) of the Civil Rights Act of 1964 is violated by a refusal to hire any women with pre-school age children while men of the same class are hired and there is no bona fide occupational qualification to justify this difference in treatment.[6] Respondent's brief, however, hardly addresses itself to this issue, and where it does, is in complete accord with Petitioner's contention that such a refusal to hire women is a violation of § 703. This agreement on the merits is indicated in several places. Thus, Respondent states:

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[5] Moreover, even if Respondent were correct in asserting that only a party's request for rehearing tolls the period for petitioning for certiorari, Petitioner's Supplemental Brief, filed in response to a request by the Court of Appeals, should itself be treated as a petition for rehearing. Petitioner's brief (filed on August 15, 1969, within ninety days of the original judgment) quite clearly asked the Court of Appeals to reconsider its prior decision. The Court accepted this brief and denied a rehearing only after polling all its members; and a substantial dissent on the merits was filed by three judges. On these facts, Petitioner's brief constitutes a petition for rehearing which, though untimely, was allowed by the Court of Appeals. Therefore, the time for petitioning for certiorari was tolled under the rule established in *Bowman* v. *Luperend*, *supra*, and the other authorities cited above.

[6] The government has recently recognized the discriminatory nature of this practice and has taken steps to outlaw it. On June 9, 1970 the Secretary of Labor issued guidelines to assure equal employment opportunity for women employed with government contractors and sub-contractors covered by Executive Order 11246. One of the guidelines states that " . . . an employer must not deny employment to women with young children unless it has the same exclusionary policies for men. . . ." 41 C.F.R. Chap. 60-20. 3(d).

To be sure, respondent defended the judgment before the Court of Appeals and prevailed there. But the highly general theory of the Court of Appeals, which may have been induced by the meager facts of record, may not be capable of defense in a number of the instances postulated by the petitioner and the *amici*. Our further review of the record in this matter leads us to the conclusion that the disposition of the case by summary proceedings in the District Court, at our instance and upon our motion—although defensible—may have created a basis for confusion—and perhaps even distortion—of the important principles of the provisions of the Civil Rights Act of 1964, which prohibits discrimination in employment by reason of sex. Indeed, as illustrated by the briefs of the petitioner and her *amici*, some portions of the opinion of the Court of Appeals may be subject to the construction that the law permits women and men exactly similarly situated with respect to problems arising out of the custody of small children to be treated differently, which we concede the law does not permit. (Res. Br. 27)

Nonetheless, Respondent argues in subsection B1 of its brief that the motion for summary judgment was properly granted by the District Court because:

> there was no evidence in the record of any act of discrimination by the respondent, the closest thing being petitioner's allegation that the receptionist had told her the respondent was not considering applications from women with preschool-age children. . . .
>
> . . . That allegation . . . standing by itself and even taken as true for the purposes of the motion, does not state a claim within the meaning of Section 703(a). Standing alone, the fact that an employer declines to

> offer employment to women with preschool-age children does not constitute a violation of the Act, and to be such, must necessarily be coupled with a comparison of the treatment of males with preschool-age children at the relevant time. (Res. Br. 19)

However, Petitioner did initiate attempts to make just this comparison. On June 26, 1968, Petitioner filed a request for admission from Respondent "that Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainee." (A. 21a.) What Respondent omits to state is that the District Court in granting the motion for summary judgment ruled that such a comparison was "irrelevant and immaterial" to the issue before the Court (A. 23a). That ruling was based on a prior order by the Court striking from Petitioner's complaint the allegation that she had been discriminated against because she had pre-school age children. (A. 14a-15a).

The propriety of the District Court's grant of summary judgment turns upon the propriety of that Court's earlier ruling. Both these actions, and their affirmance by the Court of Appeals, were based on the view that § 703(a) of the Civil Rights Act does not prohibit an employer from refusing to hire women with pre-school age children while hiring men of the same class. Therefore, the question now before this Court is whether the District Court and Court of Appeals properly interpreted § 703(a) of the Civil Rights Act. That question is discussed in Petitioner's brief but conspicuously avoided in Respondent's.

Respondent's brief attempts to distract attention from this fundamental point by attempting to create the illusion that there is uncertainty as to whether the receptionist told Mrs. Phillips that *women* with pre-school age chil-

dren were not being considered; or that *all persons* with such youngsters would not be hired. (Res. Br. pp. 3, 17) The truth is that no such issue exists in this case since Repondent admitted in ¶6 of its Answer that "the receptionist told plaintiff applications from *women* with pre-school age children were not being considered." (A. 16a-17a) (Emphasis supplied)

Respondent asserts, however, that because of the state of the record, "the receptionist's remark cannot and should not be considered as equivalent to a written, formal inflexible company policy that no woman with a living pre-school age child would be employed as an assembly-trainee." (Res. Br. 24.) But the fact is that this remark by the receptionist, whether based on "written" and "formal" instructions or not, *was* the inflexible policy of Respondents because applicants, like Mrs. Phillips, who applied for jobs with Martin Marietta were told by the receptionist (as Respondent admits in its answer) that "women with pre-school age children are not being considered." And there is no merit to Respondent's argument (Res. Br. 24) that the record does not show what response the receptionist, or someone at a higher level in the company, might have made if Mrs. Phillips had pressed her point about what kind of arrangements she had made for the care of the children.

The Court need not speculate as to the response which might have been elicited had Mrs. Phillips done so because the fact is that the receptionist's remarks did not call for the applicant to supply any such additional information. The receptionist categorically stated to Mrs. Phillips that women with pre-school age children were not being considered. That statement certainly was not designed to elicit additional information about any arrangements that might have been made for the care of

pre-school age children; and it is therefore unrealistic to expect an applicant, after being informed of the company's policy, to pursue the matter further either with the receptionist or someone at a higher level.

CONCLUSION

For the foregoing reasons, the writ of certiorari should not be dismissed, and the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with an order that it vacate its grant of summary judgment. While Respondent seems to agree that reversal and remand are the proper course (Res. Br. 27-28),[7] its brief appears to suggest that this remand may be made without this Court's deciding the merits of the question for which the writ of certiorari was granted. That position is of course erroneous, since the only ground for reversal is that the lower courts misinterpreted § 703(a) of the Civil Rights Act. For the reasons advanced in Petitioner's main brief, the District Court should be instructed on remand to conduct further proceedings to determine whether Respondent refuses to hire women with pre-school age children while hiring men of the same class. The District Court should further be instructed that such conduct, if proven, constitutes a violation of § 703(a) of the Civil

[7] The Conclusion to Respondent's brief asserts that the grant of summary judgment by the District Court, and the judgment of the Court of Appeals upholding it, should be affirmed by this Court. That assertion cannot be taken seriously, however, since Respondent apparently agrees that the lower court actions were based on a misinterpretation of § 703(a) of the Civil Rights Act. (See page 7, *supra*.)

Rights Act, and requires the entry of judgment for the Petitioner.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

GEORGE COOPER
CHRISTOPHER CLANCY
PETER NUSSBAUM
401 West 117th Street
New York, New York 10026

Attorneys for Petitioner

PHILLIPS *v.* MARTIN MARIETTA CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73. Argued December 9, 1970—Decided January 25, 1971

Under Title VII of the Civil Rights Act of 1964, an employer may not, in the absence of business necessity, refuse to hire women with pre-school-age children while hiring men with such children.

411 F. 2d 1, vacated and remanded.

William L. Robinson argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Norman C. Amaker,* and *Earl M. Johnson.*

Donald T. Kenterfitt argued the cause for respondent. With him on the brief were *William Y. Akerman, Paul A. Porter, Victor H. Kramer, Dennis G. Lyons, James A. Dobkin, Clark C. Vogel, James T. Ellison, J. Thomas Cardwell,* and *George T. Eidson, Jr.*

Lawrence G. Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Leonard, Robert T. Moore,* and *Stanley P. Hebert.*

Briefs of *amici curiae* urging reversal were filed by *Dorothy Kenyon; Norman Dorsen; Pauli Murray,* and *Melvin L. Wulf* for the American Civil Liberties Union; by *Gilbert Feldman* for the Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL–CIO; by *Jacob D. Hyman, Faith A. Seidenberg, Marguerite Rawalt,* and *Phineas Indritz* for the Legal Defense and Education Fund, Inc.; and by *Sylvia Ellison* for Human Rights for Women, Inc.

PER CURIAM.

Petitioner Mrs. Ida Phillips commenced an action in the United States District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964* alleging that she had been denied employment because of her sex. The District Court granted a summary judgment for Martin Marietta Corp. (Martin) on the basis of the following showing: (1) in 1966 Martin informed Mrs. Phillips that it was not accepting job applications from women with pre-school age children; (2) as of the time of the motion for summary judgment, Martin employed men with pre-school age children; (3) at the time Mrs. Phillips applied, 70–75% of the applicants for the position she sought were women; 75–80% of those hired for the position, assembly trainee, were women, hence no question of bias against women as such was presented.

The Court of Appeals for the Fifth Circuit affirmed, 411 F. 2d 1, and denied a rehearing *en banc*. 416 F. 2d

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*Section 703 of the Act, 78 Stat. 255, 42 U. S. C. § 2000e–2, provides as follows:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

"(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."

1257 (CA5 1969). We granted certiorari. 397 U. S. 960 (1970).

Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703 (e) of the Act. But that is a matter of evidence tending to show that the condition in question "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The record before us, however, is not adequate for resolution of these important issues. *See Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256–257 (1948). Summary judgment was therefore improper and we remand for fuller development of the record and for further consideration.

Vacated and remanded.

MR. JUSTICE MARSHALL, concurring.

While I agree that this case must be remanded for a full development of the facts, I cannot agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and

he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.

But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.

By adding [1] the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes." Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 CFR § 1604.1 (a)(1)(ii). See *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (CA7 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (CA5 1969). Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.[2] The exception for a "bona fide occupational qualification" was not intended to swallow the rule.

That exception has been construed by the Equal Employment Opportunity Commission, whose regulations are entitled to "great deference," *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), to be applicable only to job situations

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[1] The ban on discrimination based on sex was added to the Act by an amendment offered during the debate in the House by Rep. Smith of Virginia. 110 Cong. Rec. 2577.

[2] See *Neal* v. *American Airlines, Inc.*, 1 CCH Employment Practices Guide ¶ 6002 (EEOC 1968); *Colvin* v. *Piedmont Aviation, Inc.*, 1 CCH Employment Practices Guide ¶ 6003 (EEOC 1968); 110 Cong. Rec. 2578 (remarks of Rep. Bass).

that require specific physical characteristics necessarily possessed by only one sex.[3] Thus the exception would apply where necessary "for the purpose of authenticity or

[3] The Commission's regulations provide:

"Sex as a bona fide occupational qualification.

"(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—'Men's jobs' and 'Women's jobs'—tend to deny employment opportunities unnecessarily to one sex or the other.

"(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

"(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

"(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

"(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

"(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

"(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain

genuineness" [4] in the employment of actors or actresses, fashion models, and the like.[5] If the exception is to be limited [6] as Congress intended, the Commission has given it the only possible construction.

When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.

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prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

"(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." 29 CFR § 1604.1.

[4] 29 CFR § 1604.1 (a)(2), n. 3, *supra*.

[5] See 110 Cong. Rec. 7217 (memorandum of Sens. Clark and Case).

[6] 110 Cong. Rec. 7213 (memorandum of Sens. Clark and Case).